THE

JUDGMENTS

OF THE

Supreme Court of Judicature

AND OF

The High Court of Appeal

OF THE ISLAND OF CEYLON,

DELIVERED BETWEEN THE YEARS

1820-1833.

EDITED BY

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The Hon'ble L. B. Clarence
Actg. Chief Justice
with the Editor's regards.

PREFACE.

"That contradictory decisions should have been pronounced "in this Court," said Sir Richard Ottley, in the year of his promotion to the Chief Justiceship of Ceylon, "is a matter of "regret, because, if one subject can be selected which more "than any other it is the incumbent duty of judges to attain, "we may say that certainty and uniformity of practice is that "object. It is an object which I consider of such magnitude that, "unless it be attained, no exhibition of talent, no display of "erudition or of ingenuity, could render the proceedings of the Court respectable" (*a*). The discordancy in the judiciary law of Ceylon, as deplored by this eminent judge in 1827, has not been remedied to the present day. Indeed, the evil appears to have increased. For Mr. Justice Thomson, writing in 1866, said: "The "absence of a complete publication of these decrees has led to "litigation and error. The decrees of the Supreme Court, when "unprinted, cannot afford instruction to the profession generally; "and consequently that Court has had to decide the same points, "often elementary points, over and over again, because the "District Judges, Magistrates, Advocates, and Proctors have had "no proper reports to refer to; indeed, even the judges of the "Supreme Court itself, having no index to its decisions, have "elaborately adjudged many questions of law, in ignorance that "those very questions had been as elaborately adjudicated upon "years before by their predecessors, or have unwittingly over-ruled "those predecessors and even themselves." (*b*)

(*a*) See p. 92 of these Reports. Sir Richard Ottley had been Puisne Justice for about seven years before he was promoted to the Chief Justiceship.

(*b*) *The Institutes*, preface, p. 5.

It is much to be regretted that no determinate effort has been made by any one in the profession to remove, so far as possible, this reproach to the administration of justice in Ceylon, by publishing in a systematic manner the decrees of the Supreme Court. The late Mr. Thomson endeavoured to *digest* the law of Ceylon,—with what success, it is not for me to state. But I may remark that no attempt of this kind will afford satisfaction to an intelligent bar, so long as the original cases from which the doctrines and principles have been drawn, are not available to the profession at large. The proper time for digesting would be, when we have in our hands a complete collection of all the more important cases decided by the Supreme Court on matters involving points of law. Several gentlemen, from Sir Charles Marshall down to Mr. Advocate Grenier, have laboured in this cause,—at irregular intervals and broken periods, it is true, but with none the less service to the profession (*c*). The reports, as

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(*c*). The following list comprises all the local Law Reports:—

Sir Charles Marshall's "Judgments," 1833-36, *very scarce.*

"The Appeal Digest" by Morgan, Conderlag and Beling, from 1833-1842, scarce.

Continuation of "The Appeal Digest," by Conderlag and Prins, 1842-1845, now *scarce.*

Murray's Reports, 1846, *scarce.*

"*The Legal Miscellany,*" 1853, said to be edited by Mr. (afterwards Sir) Richard Morgan, *very scarce.*

Lorenz's Reports, 1856-1859.

Joseph and Beven's Reports, 1859.

"*The Legal Miscellany,*" edited by Beven and Mills; much was intended in this work, but little done. Thus we have two or three judgments of the Supreme Court in 1820-21, a few cases in 1846-47, a fair number in 1860, none in 1861, nor in 1862, nor in 1863, a few cases between January and June, 1864, a similar number between January and June 1865, a fair number for 1866, and a few cases between January and July 1867. Imperfect and irregular as the work is, it is *very scarce.*

Crowther's Reports, 1863.

Creasy's "Ceylon Reports," (publishing).

Vanderstraaten's Reports, 1869-1871.

published by them, may be roughly stated to cover the following periods : from

1833 to 1846
1856 to 1859
1869 to 1874,—

I say, roughly, because there are a few isolated scraps of reports for fractions of years here and there, and they too not easily obtainable, which may be well thrown out of consideration.

It appeared to me, under these circumstances, that I could not have in view a more pressing object of exertion than to attempt to bridge over all the existing gaps and complete the series of decisions from the earliest date at which they are to be found in the Registry. There were no less than 24 years of decisions which had been left altogether unreported, and about 6 years but meagrely reported. I have now with me a complete collection of the judgments of the Supreme Court for the thirty years in question. The present volume contains the judgments, recorded between the years 1820—1833, of the Supreme Court of Judicature and of the High Court of Appeal (*d*). There are no judgments earlier than these, and the satisfaction I feel in having brought them to

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Grenier's Reports for 1873.
Grenier's Reports for 1874.

Besides these Reports, the following relate to particular Courts :—

Handy Book of Police Court Cases, edited by Beling, 1846-1869 (2 parts).

Nell's *Courts of Requests Cases*, very scarce.

Austin's *Kandy District Court Cases*.

Grenier's Police Court Appeals, 1872.

I have not included, in this list, treatises such as Muttukisna's *Thesavalamai*, Brito's *Mukkuva Law*, &c. which contain a number of decisions of the Supreme Court on the special subjects the authors dealt with.

(*d*) For the constitution of these Courts, see the Charter of 1801; also pp. 246-250 of Mr. Cameron's Report, in the appendix.

In these pages, there will be found only two judgments of the High Court of Appeal. The extreme paucity of the records of this Court is very striking.

light, such as they are (*e*), is in a great measure enhanced by the fact that a few more years of seclusion in the dark chambers of the record-office of the Supreme Court would have placed these decisions beyond the reach of perusal or publication, for even as I found them, a great many of the leaves of the MSS. had been worm-eaten, decayed and discolored, with the ink all but bleached (*f*). Hence the deficiency reflected in pp. 80, 85, 86, 87, 88, 107, *etc.*, of these reports.

The volumes containing the bare judgments of the Supreme Court have all been compared with such of the volumes as are extant of what are called *The Civil Minutes*, from which have been taken the names of the presiding judges and such other information as I have thought it expedient to give.

The authorities cited in the judgments from text-books and reports have been duly verified.

In the Appendix will be found the Reports of Lieutenant-Colonel COLEBROOKE upon the Government of Ceylon, and of Mr. CHARLES HAY CAMERON on the Judicial Establishments of this colony: two very important documents, now exceedingly rare, and the publication of which in this volume is due to the courtesy of Sir Charles Layard, who kindly placed at my disposal his own copy of them. But for these papers, many of us should have been ignorant of the legal and political aspect of Ceylon during, and prior, to the period to which the decisions comprised in this volume relate.

So far of the years 1820-1833. In the *second* volume, I hope to publish the reports of 1846-1855, and in the *third* volume

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(*e*) These judgments have been held in great esteem by the judges of our times. The Collective Court (*Creasy, C. J. Temple and Stewart, J. J.*) sitting in appeal on the 21st June 1866, said that "for few judicial opinions did it entertain so high a respect as for Sir Hardinge Giffard's." (D. C. Colombo 38239).

(*f*) Much of this is due, I am told, to the very careless manner in which the old records were handled about the time the present Supreme Court-House was building. These records had been transferred to a temporary cadjan shed and had suffered much from exposure to rain.

those of 1860-1868. It will be my endeavour to expedite the publication of the two succeeding volumes, and when they are published, the bench and the bar would be in possession of an unbroken series of reports from 1820-1874.

Before concluding, I have to tender my acknowledgments to the Government of Ceylon for the liberal encouragement which H. E. the Lieutenant-Governor, the Honorable ARTHUR N. BIRCH, at the suggestion of the learned Queen's Advocate, has extended to me in the publication of my law reports. I need not say how indebted I feel to HIS EXCELLENCY and to MR. CAYLEY, for while the support to which I have referred relieves me of the greater portion of the expenses connected with the compiling, printing &c., of the work, their kind appreciation of my services to the profession has been to me no small reward for the labour and attention I have bestowed on the work.

P. RÁMA-NÁTHAN.

Colombo,
September, 1877.

JUDGES DURING THE PERIOD EMBRACED IN THIS VOLUME.

CHIEF JUSTICES.

The Honorable Sir Hardinge Giffard, Kt.
The Honorable Sir Richard Ottley, Kt.
The Honorable Sir Charles Marshall, Kt.

PUISNE JUSTICES.

The Honorable Henry Byrne.
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The Honorable Charles Marshall, afterwards Chief Justice.

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May 8.—*Second Term.*

Present:—GIFFARD, C. J. AND BYRNE, J.

Vanderstraaten, vs. de Latre.

(No. 3,390.)

This is a suit brought by the official Administrator of the Estate of Kronenberg, deceased, to recover Rds. 797. 2, being the balance of an account due by the defendant to the Intestate Kronenberg. Interest is also demanded by the Administrator.

1. An illiquid claim cannot be set off against a liquid claim.

2. Heirs, though not expressly named, are bound by the obligation of their ancestor, except where the obligation is personal to him or arises *ex delicto*.

It appears that the Intestate had, in pursuance of a contract entered into by him with the defendant, as Deputy Commissary General, furnished him with beef for the Troops in Colombo, from the 31st day of December, 1818, to the 24th day of January, 1819, on which day the Intestate died. On that day, the accounts stood against the defendant, making him debtor in Rds. 2,297. 2.

The plaintiff admits a receipt of Rds. 1,500 in liquidation of this balance, on the 26th September, 1819, and he claims interest on the old balance for the interval between January and September, and on the reduced balance of Rds. 797, from September 26th, 1819. This is the substance of the plaintiff's libel.

The defendant being an Officer acting on behalf of His Majesty's Government, His Majesty's Advocate Fiscal has been instructed to undertake his defence.

By that defence the ground of the demand, or the amount of beef actually furnished, is not denied, but it is insisted that the Intestate having entered into a contract to furnish beef to the Troops, under certain conditions of penalty, and his securities having, after his death, failed to execute the contract, the damages and penalties thereby incurred should be set against the present demand.

These damages, according to the calculation in the answer, would have amounted (for the difference between the amount

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of beef furnished 29th January, 1819, and that supplied from other persons) to Rds. 672; and on the same day a penalty of Rds. 5,000 for breach of contract, and on 5th and 6th of February, another penalty of Rds. 5,000: being in the whole, damages and penalties Rds. 10,672 as against the contractor; and for not urging the demand of this sum the Advocate Fiscal claims credit for the forbearance of Government.

The case then is, that the demand made by the Administrator of the Intestate's estate for the principal sum of Rds. 797 with interest, is met by a counter demand—a plea of *compensation*, as the Civil Law terms it—for Rds. 12,500.

To this the plaintiff replies by insisting that the contract ceased with the life of the Intestate, and that it was so considered by the defendant, who, in February, 1819, entered into a new contract with another person for supplying the Troops with beef. And the plaintiff relies upon the fact that the word *heirs* not being introduced into the contract, the *heir* of the Intestate is not bound by it.

Heirs in Civil Law and in English Law.

But this position of the plaintiff I hold to be quite erroneous: it arising from using the word *heirs* as it is employed in the Law of England; but in the Civil Law, its signification is far more extensive. By the Law of England, the *heir* is the person who succeeds as next of blood to REAL, as distinguished from PERSONAL property; such an *heir* can only be bound by such obligations as can affect the property he inherits, and then only perhaps when specifically named. By the Civil Law, the *heir* inherits all the rights and all the obligations of the Testator or Intestate; he is considered as one person with him, and, except in contracts which can only be executed by the individual contracting, or in cases where the obligation arises *ex delicto*, that is to say, from wrong or injury done by him, the *heir* is liable, though not named in the obligation entered into by the person from whom he inherits. Substituting the words "executor or administrator" for "*heir*," the law of England is the same. By it executors or administrators, though not named, are liable to the contracts of the deceased, so far as their assets reach. 1 *Inst.* 209, 3 *Bac Ab.* * 95, *Off. Ex.* 117. †

The principle is fully laid down by Van Leeuwen in his *Censura Forensis*, pt. i. 3. 1. § 1: "*Heirship*" says he, "is the succession to all the rights of the deceased, and this comprehends both his advantage and disadvantage, as well as

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* This reference is wrong; probably the page is 485.—Ed.

† Wentworth's *Office and Duty of Executors*.—Ed.

that existing against himself and towards others: from which, however, are excepted personal *actions* and personal duties which expire with the person." 1820. May 8.

If the case stood on this ground alone, plaintiff's replication would fail. It is therefore necessary to consider the effect of the defendant's plea, which, if available against the deceased, must, on the principle thus laid down, be available against the plaintiff, who is his heir in the sense of the Civil Law.

'Compensation' in Civil Law analagous to 'set off' in English Law.

The plea of *compensation* is analogous in almost all respects to that of "*set off*" in the law of England. "Compensation," says the Digest, "is a mutual acquittance of the debt and credit,"—*L.* 1. *ff Compens.* It is, therefore, necessary that mutual debts should exist between the plaintiff and defendant.

The debt claimed by the plaintiff is admitted as having accrued to the deceased in his life. That claimed by the defendant consists of damages and penalties not incurred during the lifetime of the deceased.

This, though the first point of difference between the claims, and certainly tending to destroy the notion of mutuality, might yet be overlooked in the consideration that the plaintiff is bound to fulfil the contracts of his Intestate and is in effect in law one person with him.

But there is another principle, governing the law of compensation and adopted into the law of set off, which requires to be attended to. The debt opposed by way of compensation must be *liquidated.* "We direct" says the law, "that compensation may be pleaded, if the cause whence it arises be "liquidated, and not involved in controversy." *L. fin sec.* 1 *Cod. de Compens. L.* 4 *Tit.* 31, *sec.* 14—1.

Meaning of 'liquidated' debt.

We cannot say that in this case the claim of damages and penalties, is in the language of the law *liquidated;* such a claim is always held to be unliquidated, until settled either by a suit at law or the admission of the party. And this is fully explained by Van Leeuwen, *Censura Forensis,* pt. i. 4. 36, § 3: "Compensation must be a debt liquidated," "pure and existing." "A liquidated debt is that which is founded upon "clear right," says the Institute, "as upon the confession of "the opposite party or where the question is one merely of "law, and the fact of a debt is not denied."—*sec.* 30 *Instit. de action.* And the word *pure* is also explained by the Institute, where it is opposed to *conditional.*—*L.* 3, *tit.* 16, *de verb oblig:* "Every stipulation is either pure, or for a time certain, or under condition.

Of the claim now made, of damage for a loss sustained by the purchase of beef at an advanced price to supply the

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deficiency of the contractor, and of penalty for the breach of contract, it cannot be said that it is either *liquidated* or *pure*, that is to say, free of all condition,—it is on the contrary in every point of view *unliquidated*, and it depends wholly on the condition upon which it is founded, the neglect of breach of contract.

It is fortunately unnecessary in this case to advert to the inconvenience which may result from the Official Administrator being bound to continue contracts like the present entered into by Intestates; the interest which the securities must feel in carrying on the contracts to save themselves, will probably prevent its becoming at any time a serious mischief; but as the law stands, and as we must declare it, it seems a hard alternative to oblige him, the Officer of the Court, either to enter into pursuits utterly inconsistent with his other duties, or to leave the Estate under his administration liable to losses, from the neglect or misconduct of those over whom he can have no control.

This is however at present out of the question. We have only to consider the effect of the plea, and upon the whole it is my opinion that the plaintiff is entitled to recover in the present suit; the plea of compensation offered by the defendant not availing in point of law.

Judgment for the plaintiff with the interest claimed.—(Per *The Supreme Court of Judicature*).

Gambs vs. Kriekenbeek.

(No. 3,381.)

Liability of legal practitioners to neglect, ignorance or mistake in the practice of the law.

This is a suit brought to recover damages against the defendant, an Acting Notary Public, for drawing a Bond, without the clause renouncing the benefit of the *S. C. Velleianum*, whereby the plaintiff lost his remedy against the sureties (who were women). "Owing to which gross neglect or wilful omission," as the libel alleges, "the plaintiff lost his debt of Rds. 444, which he demands with interest, and Rds. 166. 2. being subsistence paid to principal debtor from 1st—1819."

It appears in the very title of the case that the defendant is not a regularly bred Notary Public, but what is called an acting one. But as such he was employed by the plaintiff, and it is in evidence that he received his fee from the plaintiff for drawing the bond in question, which he was therefore bound to draw to the best of his skill and knowledge. There does not appear any reason to impute wilful omission to the defendant, this must therefore be discharged from our consideration of the case.

There can be no doubt that by the law of England, which on these subjects derives most of its principles from the Civil Law, gross neglect, mismanagement, ignorance or corruption, may be the foundation of an action against an Attorney. *Russel v. Palmer*, 2 Wils 325, and a Notary Public is at least as responsible. It is equally certain that an Attorney is not answerable for any loss his Client may sustain, on account of a mere involuntary undesigned mistake in a nice point of practice. *Russel v. Palmer*, 4 Burr. 2063, 2 Wils. 325. 1820. May 8.

But he is liable when he ought to know his duty, as for drawing a bond on a wrong stamp, a matter supposed to lie directly within his means of knowledge. *Pitt v. Yelden*, 4 Burr. 2091. *Guilliam v. Barnet*, 2 Smith 156.

In this case, as I have already suggested, the defendant is not a regularly bred Notary Public. The circumstances of this Island have long prevented our receiving any accession of practitioners in any branch of the Roman Dutch Law from the country in which it was cultivated as the Municipal Code. The consequence has been that Notaries Public, Proctors, and Advocates of the several Courts in this Island have, for a considerable time, been necessarily persons not regularly educated to these several pursuits. For such persons great allowances must be made, and if it appears that the mistake of the defendant is one which any other practitioner would have been at the time equally liable to, we would go very far indeed were we to charge him with gross neglect. For error in judgment, and most particularly in the practice of law, very great tenderness is shewn—and, indeed, when all, from the judge to the writing clerk, are equally exposed to the danger, it would be exacting too much from human frailty to look for total exemption.

And on this point Van Leeuwen in his *Censura Forensis* speaks fully and feelingly :

" In like manner (he has been speaking of Judges) neither is an Advocate answerable, who falls into mistake through ignorance of the law. For though it be disgraceful to a Doctor and one professing the *laws* to be ignorant of the *very law* itself, yet would it be very unjust and hard measure to them if, in so diffuse and difficult a science as law and practice,—amidst such a variety of opinions and in such a crowd and procrastination of causes very often not allowing full time for deliberation—they should themselves be held liable to the hazard of every suit, in case any thing fell out either through their imprudence or want of experience."

It seems not to be denied that this omission of the defendant was the cause of the plaintiff's failure before the Sitting

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Magistrate's Court. But there has been no appeal, and to decide against the defendant would be for this Court to decide in effect implicitly according to the decision of the Sitting Magistrate.

The observance of the *S. C. Velleianum* in the Island.

Putting this, however, out of sight for the present, however difficult it might be for the Court to pass over the objection, we shall suppose that the plaintiff has suffered the loss inevitably in consequence of the error of the defendant. It is certain from the evidence of *Mr. Van Dort*, that previous to the British occupation of this Island, he and other regular Notaries Public were accustomed to insert the renunciation of the *S. C. Velleianum*, where *women* were *sureties*.

But it should seem that this practice, after that period, (for some reason not explained) fell into disuse, and he has produced many bonds from 1803 downwards, in which it is omitted, though *women* were sureties ; though it is to be observed that these were mortgage bonds in which the hypothec might have been held sufficient, and the sureties considered as mere matter of form—this I say is a possible, though by no means a sufficient, reason for the omission.

The practice says *Mr. Van Dort* fell into disuse and was revived about three years ago. It is within all our recollections that the case which gave occasion to its revival, that of *Phebus's* surety *Mrs. Pegalotti*, excited no small surprise at the time ; and I will venture to say that the Judges themselves were as little acquainted with the existence of the S. C. Velleianum as any Notary in the Island could have been.

It has however been carefully attended to ever since.

But in fact from 1803 to 1816, not a bond containing the *renunciat* has been produced. How then can a general and prevalent misconception, for such, from the evidence of *Mr. Morgan* and *Mr. Van Dort*, we cannot but believe to have prevailed,—how can it be visited particularly on the defendant, if he erred? And that he did so, we have only the Sitting Magistrate's decision before us to prove. He did so neither from neglect nor corruption, but from the general mistake prevailing throughout the profession.

As however the plaintiff has been unfortunately a sufferer, his suit is dismissed *without costs*. (Per *The Supreme Court of Judicature*).

May 12.—*Second Term.*

Present :—GIFFARD, C. J. AND BYRNE, J.

In the matter of the Goods of S. Holman, deceased.

[Notes of the argument.]

Mr. Van Cuylenberg moves, on behalf of the widow, for administration to deceased, dying Intestate.

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The widow may administer to the estate of her husband, though her right thereto is not absolute.

The Registrar is heard, who submits to the Court its decision dated 13th November, 1816 upon the application of Mary Gunn for administration of the Estate of her husband, George Gunn.

Mr. Cuylenberg reads clauses 53rd and 57th of Her Majesty's Charter of 1801 ; administration of Intestate to next of kin does not *exclude* widow. According to form in diocese of London. After Charter published in 1802, 30th April, 1802. *Vandersmagt's case*, administration to widow and several others after. By the same judges who brought out the Charter. By law, widow as well entitled as husband. Deceased and husband, *Europeans:* according to 53rd clause widow entitled.

Mr. Prins on same side:—

I rely on the 53rd clause. As to the British and Europeans, the Ecclesiastical Law, as it is now used and exercised in the diocese of London. What is the Ecclesiastical Law as regulated by statute in cases of administration ? By 31 Edward 3. c. 11. the Ordinary is to depute the next and most lawful friend. By 21 Henry 8. c. 5. to grant administration to widow or next of kin or both. This Court in place of the Ordinary. In this case the wife would be entitled. But this is said to be controlled by subsequent clause of Charter. § 55 gives this Court power of committing administration of Intestate to the next of kin. § 57 requires the Court to give administration to next of kin residing within the jurisdiction and of full age, and when no such person appears, the Registrar is to have letters ad colligenda.

[Judgment.]

The omission of the word widow is said to take away her right. And it is supposed that this having been so decided in the case of *Gunn's widow* we are bound by that decision.

It is always with doubt and difficulty that judges ever decide in contradiction to a former judgment, but when that former judgment appears to them totally contrary to the principles by which they must be governed, it is their duty to meet this difficulty and overcome doubts, founded merely upon

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their respect for those whose decision they think erroneons; and in this case we can do so with the less compunction, when the last decision contradicts the preceding practice upon the subject, and still more, when it proceeded, as we conceive it to have done, upon a mistaken view of the fact upon which it was principally rested.

In the case of *Gunn*, of which I have a note taken at the time and I believe not inaccurately, the Court relied principally upon the preceding case of *Mrs. Cuylenberg*, as having decided the question against the right of the widow generally.

The only account of that case of *Cuylenberg* which the Court possessed was derived from its own records, and as we have access to precisely the same means of information, it is in our power to examine, as particularly as our predecessors did, into the circumstances of that case, and a view of the whole will convince any one that the right of the widow is not negatived by that case.

The widow of Cuylenberg applied for administration. The next of kin, the daughter, did the same. Their rights by the statute were precisely the same, and the Court might in its discretion (under the statute) appoint either. The decree was for the next of kin, but this was an election which the Court might exercise, had the case occurred in England, where no such difficulty as the Charter is supposed to create exists; and this discretion is properly confided to the Court: it is often usefully exercised when there are children, and the widow has remarried improvidently, or in many other cases where the Court might think it more advisable to confide in the next of kin, than the widow.

So far then as the Court supposed itself bound by the case of *Cuylenberg*, the ground of the decision appears to fail.

Putting the case of *Cuylenberg* aside and looking into the records of the Court, we find that from 1802, when the Charter began to operate, to April, 1804, immediately preceding that decision, the course was to grant administration to widows. Seven different instances in Nos. 170, 284, 329, 370, 378, 380, and 407, have been found in which it was done.

I must admit that after this period there seems to have been a prevailing impression that *Cuylenberg's case* had decided against the widow, for until *Gunn's case* in 1816, we do not find an application made on behalf of a widow, and that case rests, as I have observed, rather upon the authority of *Cuylenberg's* than upon any principle laid down by the Judges who decided it.

If the authority of *Cuylenberg's case* fails, *Gunn's* founded on it cannot have greater weight, and must fail also. Having

cleared these two cases out of our way, we proceed to examine the principle on which the claim of the widow has been resisted. 1820. May 12.

The position is that the omission of the word *widow* in the 57th clause takes away that right, which the 21. Henry viii would give to this Court of granting letters of administration, acting upon the Ecclesiastical Law of the diocese of London, as directed by the 53rd clause.

If in similar cases of omission, a right has yet been found to survive, we shall have much of our difficulty removed, but where that has occured in a case strictly analogous, it must appear decisive.

Now, the right of the *husband* to administration of his deceased's wife cannot, in strictness of expression, be said to be recognized in the words of the statute of Henry viii, which confines the election of the Ordinary to the widow or next of kin. Yet the right of the husband whether derived from common law, or whether supposed to be given by the statute Edward iii, by the words 'next and most lawful friend,' has never been questioned in England. Though the word 'husband' is omitted in the statute of Henry, the husband is surely as effectually excluded by being omitted in the statute Henry viii, as the wife can be by the omission in this Charter.

But bring the question nearer to us: the right of the husband has not been questioned: even here it has been the constant practice to grant him administration, and yet the word 'husband' is no more to be found in the 57th clause of the Charter than the word 'widow.'

It is worth while to consider how the matter has been treated by other Courts in India; for all these Courts have been framed as nearly as possible upon the same plan, and their Charters are nearly transcripts of each other. The Madras Charter is however the only one to which I have had access.

The Madras Charter, after giving the Court power to grant administration to the lawful next of kin, proceeds in the words of the 57th clause to say: "And in case no such person shall "then be residing within the jurisdiction of the said Court, or "being duly cited shall not appear and pray the same," so far in the same words, it then goes differing from ours "to the prin-"cipal creditor of such person or such other creditor as shall be "willing or desirous to obtain the same, and for want of any creditor appearing, then to the Registrar &c."

The substitution of the Creditor, it is observable, has no place in our Charter; but it is useful to our argument, as creating a right for persons very likely to assert it against all opponents: Creditors, not a word is mentioned of the Widow

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yet. With this omission and with the obstruction which, of all other persons, a Creditor would be the most likely to oppose to her claim—it is, and long has been, the unquestioned practice at Madras to grant administration to the widow.

Upon principle therefore, and upon analogy, and upon the credit due to such a construction of a clause even more hostile to the claims of a widow than those of our Charter, I am of opinion that the widow is entitled to administration, should the Court think it advisable to prefer her to the next of kin.

In addition to the argument contained in this judgment, it may be right to notice an observation, not indeed made during the discussion, but which occurred afterwards: it is that there is no record of any administration granted to widows by the Dutch Court of Justice anterior to the English conquest, and this has been suggested as the probable reason of the omission in this Charter.

Administration, unknown to the Dutch law.

But this seems quite gratuitous; the reason why the widows of Dutch persons did not obtain administration was, that no administration was known to the Dutch Law, and the *Communio Bonorum* fixed and bounded the widow's right so absolutely, that she could have no interest in her husband's share of the property either before or after his death. And it is not improbable that the case of *Cuylenberg* was decided more on this footing than with any reference to the Charter, or any omission discernable in its provisions.

August, 28.

Present:—Giffard, C. J. and Byrne, J.

Verploeg, vs. Mekern.

Aug. 28.

(No. 2,882.)

According to the practice of the Dutch Merchants in Ceylon, an Agent is not liable to pay interest on a balance in his hands, unless he wilfully delayed paying it or employed it to his own advantage.

This case was instituted in the month of January 1818, by the plaintiff (attorney of his mother *Borkelmans*, the heiress and the only remaining executrix of the estate of the late *Jacobus Borkelmans*, deceased), to recover from the defendant, as executrix of her late husband *Frederic Cornadi's* estate, the sum of Rds. 37,352-13 in Ceylon currency, and Rds. 6,000 in Dutch Credit Brieven, due to the estate of the late *Jacobus Borkelmans*.

The transactions upon which this claim is supported are now of nearly twenty years' date—the original parties are all dead, and the present plaintiff resides at Middleburgh in Holland. All these circumstances tend to increase any diffi-

culties which might arise in the case, and have necessarily produced much delay; but the Court believes that it has arrived at a fair view of the case notwithstanding these impediments, and notwithstanding the total want of energy, industry and foresight which has marked its progress in the hands of the practitioners on both sides. 1820. Aug. 28.

The plaintiff claims upon the foot of an account current, commencing in the year 1798 and terminating, as he has made it up in 1818, leaving a balance to his credit of the sum I have stated.

The defendant replies to this claim that the balance really due to the plaintiff amounted only to Rds. 2,269.14½ pice, and Rds. 6,000 in credit Brieven, and that the erroneous difference between this and Rds. 27,352 is occasioned by a running demand for interest; and she tenders the balance and the credit Brieven thus stated in her answer to the plaintiff. Her account is stated to 1809, and is continued by credits for the interests on credit Brieven down to the filing of the libel. In an amended answer, she adds to this balance a sum of Rds. 4,598 and 22 pice—omitted in her first account—making the admitted balance Rds. 6,867 11-2, and this with the Rds. 6,000 credit Brieven appears to have been paid into Court on the 2nd of March 1818.

It being thus admitted that the only material question is whether the charge of interest made by the plaintiff should be allowed, the Court desired information upon the subject.

It appears that *Mr. Borkelmans* had employed *Mr. Conradi* to collect debts and dispose of merchandise for him in Ceylon, and *Mr. Conradi* received a commission upon the monies and merchandise so passing through his hands.

It appears by a reference to *Conradi's* books, made at the desire of the plaintiff, that the accounts between him and *Borkelmans* commenced in 1792, and that down to 1809 a balance generally lay in the hands of *Mr. Conradi*, which last account current is closed in February, 1809. In these accounts *Conradi* never debits himself with any interest on these balances.

It was of course the first object of the Court to ascertain whether, by the custom of merchants here, such balances were liable to interest. On this head our information has been scanty, but such as it is, it goes to negative the opinion that by the custom interest was chargeable. It is here that the distance of time operates as an impediment. Of the Dutch merchants, not one remains with the exception of *Mr. Uhlenbeek*; he has been almost stopped in transitu to require this information from him before his departure, but he says that neither his father, who was formerly an Agent, nor

1820. Aug. 28. himself, who has lately acted as such, were charged interest on balances, nor is an Agent ever so charged, unless he makes use of their money so in his hands. And this seems the only just ground upon which such interest can be demanded.

The books of other merchants now deceased have been offered by the plaintiff in contraversion of this opinion of *Mr. Uhlenbeek.* They do indeed shew charges of interest on balances, but they can only prove, if they prove any thing, the particular case of these merchants—they cannot be evidence of a general practice, and the charge, for aught the Court may know, may have arisen out of particular contracts or circumstances which might otherwise explain the matter without referring to any general rule.

It now becomes our duty to enquire whether any particular contract existed to warrant the charge of interest in this case, or whether *Conradi* appears to have employed the money to his own advantage, so as to be chargeable with interest on that ground.

As to a particular contract, the existence of any such agreement appears to be negatived by the correspondence given in evidence. An attempt appears to have been made by *Borkelmans* in his life time to charge interest; a letter of *Mr. Verploeg* and his wife acknowledges that *Conradi* had resisted this immediately, and they explain this conduct of *Borkelmans* by saying that *Conradi's* letter had mentioned their money being at interest.—If it was necessary to account for the demand by citing this letter, it is clear that no positive contract existed which could have been referred to for authority. In aid of this opinion we have *Conradi's* books, kept from 1792 to 1809, in which no interest is credited, excepting that received from credit Brieven, and appearing as such, throughout the whole account. So far from insisting on interest, the parties seem glad to get rid of the subject by saying "we will agree about it."

It is next to be considered whether we have any proof that *Conradi*, either wilfully delayed paying the balance, or employed it to his own advantage.

The evidence of *Conradi's* letter of August 1806, however, has been put in and is decisive on this point. He states the several efforts he has made to remit the money to Batavia and to Europe. He states, and we all know them, the circumstances of difficulty arising out of the state of public affairs which rendered it wholly impracticable to do so; he shews how the mistake as to his having placed the money at interest arose, by referring to an ineffectual attempt which he for a while hoped would be successful to place it at interest in Batavia;

and never have I read a document more strongly proving the anxiety of an Agent for the advantage of his Principal and the integrity of a fair dealing honest man. 1820. Aug. 28.

The accounts furnished by his Agent *Paschen* at Batavia corroborate his statement fully, they shew that the attempts in question were made; and the balances remaining unproductive in *Paschen's* hands indubitably prove that *Conradi* neither made, nor could derive, any advantage whatever from them.

With respect to the smaller items in the defendant's accounts, we are of opinion that she is entitled to take credit for them all, excepting in the instance of charging 5 instead of 2½ per cent. for receiving interest on credit Brieven— there can be no reason for such a charge—this is admitted even by their Advocate who withdraws it. But the consequence will be that the balance against her will be increased by the sum of Rds. 78 9 0, and that instead of the sum of Rds. 7,867 paid into Court, we must give a decree for Rds. 6,945 9 0, and the credit Brieven amounting to Rds. 600 with cost, the sum decreed being above that paid into Court.

1821.

January, 22.—First Term.

Present:—GIFFARD, C. J. AND BYRNE, J.

Ondatjie, vs. Hooper.

1821. Jany. 22.

(No. 3,616.)

Matters relating to an arrack renter being prevented by the Government from receiving certain duties to which he was entitled, do not exclude the jurisdiction of the S. C. of judicature, under cl. 73 of the Charter of 1801.

The plaintiff in this case was the Arrack Renter of Jaffna in the year 1818-19, and the defendant, the Collector of that District. The arrack rent having, as usual, been offered to sale in the beginning of 1818, the defendant promulgated certain *Conditions*, as they are called, upon which the rent was to be held. These *conditions* form a contract between the Renter and the Officer of Government, by which, in consideration of certain payments made by him, certain securities and privileges are stipulated for, rendering the rent profitable to the purchaser. This profit is derived from a monopoly of the retail sale of arrack in the district for the term of his rent; accordingly, heavy penalties are prescribed against the retailing arrack by others and to prevent its being privately introduced by wholesale dealers; and to compensate the renter, the importation

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by wholesale (unless for the use of Government) is subjected to a duty of nine fanams per gallon payable to the renter.

It is alleged on the part of the plaintiff, that the Collector did, by his authority and interference, prevent the plaintiff from receiving certain duties upon an importation by wholesale, to the loss of the plaintiff to that amount; and, further, that he granted permission to the importer, by his license, to vend the arrack so imported in such proportion, as though not strictly retail, went to deprive him of a considerable amount of his monopoly of retail profits; and he claims damages for each description of loss.

The defendant, appearing by His Majesty's Advocate Fiscal, pleads in effect a general issue, and, as it appears by the warrant filed, upon which the Advocate Fiscal acts, that the Government considers the defendant as having acted for the interest of Government, we presume that he has done so.

What may have been his intention can have no manner of weight with us, should we believe ourselves obliged to expound the law differently from the defendant. Our duty is to consider whether he has acted legally, and, if not, whether by acting otherwise he has wrought injury to the plaintiff. The defendant *Mr. Hooper* personally, is not the object of the opinion or decision of the Court.

A plea to the jurisdiction, when to be taken.

After evidence had been given on both sides, and the case was apparently closed, we heard, for the first time, from the Advocate Fiscal, on behalf of the defendant, a sort of plea to our jurisdiction in the case. Though in general we are averse to the introduction of strict rules in pleading, yet there are rules prescribed by common sense and obvious necessity, which it would be mischievous to relax; one of these is that a plea to the jurisdiction should be offered before evidence is gone into, because, if the Court has no jurisdiction, all enquiry into the matter must be unavailing to any useful purpose, and a waste of public time. But even this consideration may be waived in the present instance, because doing so may serve to remove some mistaken impressions which are known to prevail upon this particular subject. The bar to our jurisdiction is supposed to exist in the 73rd clause of the Charter of 1801 by which this Court is forbidden to exercise jurisdiction concerning any *act done in the collection of the revenue, according to the usage and practice of the country*, and it is suggested that this is an act done *in the collection* of the revenue.

But what is the act complained of? that the Collector did by his authority prevent the plaintiff from *receiving the duties stipulated* by his condition. We are fortunately assis-

ted in our consideration of this part of the case, by the very able Judgment of *the Supreme Court of Madras* upon this very point.* Large sums had been exacted by the authority of the Company's Government from a person named *Vencata Runga Pillay*, to recover back which he brought his action against the Government. The Madras Charter in this instance is not so full as ours, for it omits the important words "in the collection of the revenue;" but the Court finding these words in the Act of Parliament, authorizing that Charter, construed it as if it contained them, and held that it did not exclude the jurisdiction in any acts not done immediately in the collection of the revenue. 1821. Jany. 22.

One might be permitted to lament that even such an exclusion should exist, were it not controlled by the subsequent necessity of shewing that such acts were also done according to the usage and practice of the country, but happily better feelings than have some times heretofore prevailed, are every day operating to ameliorate that usage and practice.

Upon the authority of this case, therefore, the plea to our jurisdiction, had it been regularly offered, could not, as we conceive, be available for the defendant.

We are then let into the consideration of the facts. It is impossible to construe the condition in any other way than as the plaintiff has understood it. The object is to protect his monopoly; that monopoly gives to him a very high rate of profit upon his retail sale, a high rate with a view, as well to the health and morals of the people, as to the advantage of Government, to which he pays a proportionally high rent as a protection to him, without doing serious inconvenience to trade. The wholesale importation is subjected to a comparatively light duty of nine fanams a gallon, and as those who purchase by wholesale from the wholesale dealer would of course not purchase from the renter who is bound to charge Rds. 4 and 9 fanams per gallon, that duty of 9 fanams is given to him in compensation.

But says the defendant, although the condition may be so expounded, yet the Regulation No. 4 of 1818, was received between the time of bidding and that of entering upon the rent and the plaintiff had notice of it, and that Regulation repeals the condition.

To this observation several replies suggested themselves. The first is the natural observation, why did you enter into a condition which you, as a Collector, must have known to be

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* *Vencata Pulle* vs. *East India Company*, 1 Strange's Madras Reports.

1821. Jany. 22. contrary to the Regulation; if you did so, it must be taken as a fraud on the plaintiff.

But the truth is, that the regulation of the year 1818 does not contravene in any degree the condition. One of its clauses forbids the officers of the Crown from taking *fees* or gratuities from wholesale dealers, but there is not a word relating either to repealing, or enforcing, the duty stipulated to be paid to the renter, on the importation of arrack. Having, as we conceive, shewed that the condition is not repealed, let us look to the evidence.

It appears that a person named *Rodrigo* did, in March 1819, purchase from the importers four leaguers containing about 600 gallons of arrack, he being a licensed wholesale dealer.

It is in evidence that the Renter demanded the duty upon this arrack upon its importation, and before *Rodrigo* removed it, that the matter was referred to defendant as Collector, that he decided that the plaintiff was not entitled to the duty he claimed, and in consequence that the duty was not paid.

This was not the mere opinion of a person whose error might be immaterial or not injurious to the plaintiff; it was the opinion of one having authority to enforce it, and in consequence of which the plaintiff was actually deprived of the duty he claimed.

The sentences of other Courts in cases connected with this matter have been offered to us on behalf of the defendant; these sentences, however respectable, having been pronounced in cases where different parties were concerned, can have no weight whatever in this case.

As to the claim of the plaintiff respecting licenses granted by the Collector for the removal of arrack sold by the wholesale in wholesale quantities, we think it stands upon different grounds. The wholesale proportion is fixed at twenty gallons; it is to be supposed that the quantity is so great as to limit the number of purchasers and so to render the wholesale duty a sufficient remuneration to the renter: that wholesale duty we think ought to have been paid. And our decree is intended to put the plaintiff in the same situation as if it had been paid. Supposing it paid, there is then nothing to prevent the arrack being sold and removed by wholesale buyers under the authority of the Collector.

We are therefore of opinion that the plaintiff is entitled to recover against the defendant the duty of 15 Rds. for every twenty gallons imported by *Alexander Rodrigo*, being 600 gallons, amounting to 450 Rds.; bnt we do not think him entitled to any compensation for the arrack removed by wholesale.

Judgment for 450 Rds. and costs.

The following is the case referred to in the above judgment, and found incorporated with it in the minutes of the Supreme Court of Judicature of Ceylon :—

Vencata Pullay, vs. East India Company.

A Royal Charter, conferring Jurisdiction to a Court, may stand corrected by the Act of Parliament which prescribed the framing of it.

The limitation of the jurisdiction of this Court, on the point in question, arises from the section, referred to, of the 21st of the King, * by which the Charter of this Court, must stand corrected.

Were it to be otherwise, it would follow, that an act done by His Majesty in Parliament might be controlled by His Majesty out of Parliament, that when His Majesty had with the advice and consent of Parliament passed an Act for the establishment of a Court of Justice with certain powers, he might afterwards of his own authority, and without such advice and consent, erect one, professing to be erected under that Act, with other more limited powers—with powers, perhaps, not adequate to the object his Parliament had in view. This is what no man, who has any knowledge of the constitution of his country, would contend for.

It would follow, too, that the measure of Justice would be different in the different provinces of British India, that the Supreme Court at Calcutta would have more ample means of redressing its suitors than the Supreme Court at Madras, or, what perhaps will strike more forcibly upon the attention of the defendants, that the revenue jurisdiction of the Governor General in Council would be more limited than that of the Governor in Council of a subordinate Presidency. This is what the defendants themselves would hardly contend for, or desire, and what it is impossible to suppose His Majesty could mean ; for the purpose, then, of the present argument, the language of the part of the Charter in question must be taken to be, that we are not to have or exercise any jurisdiction, in "any matter concerning the revenue, or concerning any act or "acts, ordered or done, in the collection thereof, according to "the regulations of the Governor in Council." For, as to the "usage and practice of the country," it has not been relied "upon as bearing, in any degree, upon any of the matters in question.

The next question relates to the construction and meaning of this part of the Charter, thus corrected. As to this, we

* 21 Geo. iii. c. 70. s. 8.

1821. Jany. 25. are agreed upon the first part of the limitation, that "matter concerning the revenue" means immediately concerning it.

It was contended for the Company, that if it have such a tendency only, though but remote and consequential, this Court cannot proceed; it becomes forbidden ground.

To the proposition in this latitude it is impossible to assent. It draws no line. It leaves the jurisdiction of the Court perfectly at sea; and would lead to consequences the most extravagant and perplexing, for the objection may be taken by any ordinary defendant in the Court. It is not confined to suits where the Company or its servants alone are concerned.

The restricting it in the manner I have stated, is consistent with the description of like limitation in various parts of the elaborate case of *Cawthorne and Campbell* in the Exchequer Reports; and must be presumed to be so with purpose intended by the Legislature in creating it.

So much having been premised, the first thing to be considered is, upon what the question of jurisdiction depends. It depends most certainly upon the 8th section of the 21st of George iii., chapter 70.

Had the Charter constituting this Court adopted, as it ought to have done, the language of that Act of Parliament, it would have depended immediately, upon the words of the Charter. But the framers of this instrument have inadvertently, in this respect, pursued the wording of the repealed Charter of the late Court of the Recorder, by which that Court was prohibited from holding any jurisdiction of any matter concerning the Revenue, "or act done or ordered, according to the "usage and practice of the country, or the Regulations of the Governor in Council" omitting, between the words "ordered" and "according," the intervening words in the 21st of the King, "in the collection thereof." The repealed Charter was consistent in this respect with the act upon which it was founded, though it is scarce to be believed that the Legislature, in passing that Act, intended the omission in question. The consequences are too monstrous. Be this as it may, the Charter of the present Court is founded upon a subsequent Act of Parliament, prescribing to His Majesty, in the framing of it, the Constitution of the Supreme Court at Calcutta as the model.

January, 29.

Present:—GIFFARD, C. J. AND BYRNE, J.

Boyd, *vs. Staples*.

(No. 3,625.)

1821. Jany. 29.

1. Prescription guided by local regulation, &c.

2. A bill given in payment of a debt, does not operate as a discharge, until it is actually paid, or unless the creditor has been guilty of laches.

This suit is brought by the Agent of *Hebdeen and Co.* of London to recover from the defendant a certain sum due, on the foot of an account, for goods consigned to the defendant.

The amount of the demand, which is very awkwardly set out in the libel, is in fact a balance of £929. 8. 3, British, acknowledged by the defendant in 1815, with interest at 5 per cent.

The defendant in his answer has admitted the account, and, indeed, a larger balance than that claimed (the case of difference however has been explained), and for his defence relies upon his having remitted bills for the liquidation thereof, which not having been protested, he does not consider himself longer responsible, and he pleads the English Statute of Limitations, 21 James I c. 16, in bar to the action, no legal proceedings having been taken within six years.

This last ground of defence must be first considered, as should it prevail the other need not be discussed.

But the English statute of limitations is not the Law of this Island—the Dutch Roman Law and the Regulations of the local Government are to guide us, in the administration of Justice. The limitation of actions, or, as it is called in the Civil Law, prescription, has been variously settled at different times in different countries. The plea in this case was not found tenable, and the defendant's Proctor has amended his first answer and pleaded prescription generally, in order to have recourse to a limitation or prescription to be found in the Institutes of Justinianus, but as the local Law stands, that limitation has as little effect here as the Statute of James; the local regulations, promulgated by Governor North in 1801, fixes the prescription at ten years, and by that prescription the Court is bound. It is not suggested that such a prescription has run against these plaintiffs, and indeed were it our duty to decide on the Statute of James, the defendant's letter of 1815 would save the case from the six years limitation.

In support of the plaintiff's demand, a letter written by the defendant, and admitted by his Proctor, is filed, and this letter fully developes the whole case.

1821. Jany. 29.

It sets out indeed with complaints as to the delay in sending the goods furnished, and the damaged state in which they were received, but the answer to this is, that having accepted the goods he has waived his right to these objections ; he then goes on to state the balance against him at £936. 3 3, which however subsequent explanations have reduced to £929 8 3, and he proposes to the liberality and justice of the plaintiff, in consideration of those circumstances, to take off 20 per cent. of the account, thus fully admitting his liability to the whole balance, unless the plaintiffs should reduce it by their own voluntary act.

He then goes on to state "*with a view to settlement*, I now transmit a power of attorney *empowering you* to recover any sums that may be due to me"—and he goes on to specify such sums:

"You will in the first instance apply to the Executors of "the late *George Vendust Esq*. for the recovery of certain "sums, as enumerated :—

"Captain Fowlman on his father	£400	0	0
"Lieut. Deck...	250	0	0
"Lieut. Crooke on his uncle	70	0	0

"as well as to request a copy of my account and the balance, "should it be in my favour."

Here he treats the executors of *Vendust*, as his debtors for these sums. It has been insisted on by his Proctor that *Vendust* was a partner in the firm of the plaintiffs, and that they are liable as his surviving partners to the amount of these bills.

It appears, however, from the statement made in argument by the defendant's Proctor, that *Vendust* was the private agent of the defendant ; it appears from this letter that they had private accounts, not a word in the letter authorizes the supposition that even, if he were a partner, the bills had been sent on the partnership's account. Had the defendant thought so, he would have said—"I have remitted to you, through "your partner Mr. Vendust, so much in bills ; I look to your "firm for credit to that amount :" but what does he do? he speaks of applying to the executors of *Vendust* for the recovery of those bills, as well as the balance, if any, of his private account, evidently confining the whole transaction to *Vendust* individually, and not even by a hint extending it to the partnership.

But it has been urged at the Bar that we should delay this case, in order to enable the defendant to procure evidence from England, that *Vendust* was a partner—which evidence we would not hope to obtain in less than 18 months or two years ; suppose, however, it were obtained and that it stood

confessed or proved that the partnership, through *Vendust*, had actually received the bills in question, we have already stated that, in pronouncing our opinion, we are bound by the Dutch Roman Law, and the local regulations of Ceylon. The local regulations offered us no direction on this subject, and the text of the Dutch Roman Law furnishes us little to guide us.

1821. Jany. 29.

Affinity of the Commercial Law of England with the Dutch Roman Law, through the code of the Custom of Merchants.

But it fortunately happens, that the great Commercial Code, called the Custom of Merchants, has its foundation in this very law; it is principally composed of the rules laid down by the consent and practice of the Merchants of Holland, when they had almost the whole commerce of Europe in their hands, and these rules having, under the denomination of the Custom of Merchants, been adopted and embodied into the Commercial Law of England, we look upon every decision of the Courts of Westminister upon Commercial subjects as a commentary upon the Dutch Commercial Law, the law which we are bound to observe.

This being premised we have the satisfaction of being able in all cases of difficulty to resort to the decisions of some of the ablest Lawyers who have ever lived, by whom the Commercial Law has been from time to time expounded.

In this case then, supposing, as we have said, that it was proved or admitted that these bills had been received by the partnership, does that amount to payment? We are of opinion that it does not, but that it lies on the defendant to shew that these bills have been actually paid, before they can go in the discharge of his balance.

On this point we have a full and clear decision, by as learned and able a judge as ever sat in Westminister Hall, Mr. Justice Bayley, a lawyer peculiarly distinguished by his intelligence upon commercial points. That eminent lawyer, in the case of *Bishop* v. *Rowe* reported by Maule and Selwyn p. 368 vol. 3, says :—

"It seems to me that the defendant has not made out that the substituted bill [it was a bill given in payment of a debt] was paid, nor that such circumstances have taken place as amount to satisfaction.

"It is true, that the onus of proving all the facts necessary to support the action lies on the plaintiff, and therefore, where the action is against an endorser or drawer, it is incumbent on the plaintiff to prove notice, because without notice he has no right to enforce payment either against the drawer or endorser.

"But here the onus of proof lies on the defendant who is to substantiate his defence."

And he goes on to shew how, in that particular case, the

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defendant might have shewn, had the truth been so, that the bill was paid, as the defendant in this case might have done, by the persons who paid the bills, if they had been discharged.

And the Judge goes on to say "the plaintiff denies that he has paid, but states that he was refused: to this the defendant answers, that circumstances may have occurred to entitle me to consider it as paid, and that by your laches you have made the bill your own. If he is to insist on this way, why is not the onus of proof to lie on him? but inasmuch as there is no such proof, we are not warranted in concluding that there have been sufficient laches to operate as a discharge."

So in this case, we are called upon with respect to these three bills to presume, and to presume contrary to the defendant's own letter, that they were sent to the partnership in being sent to *Vendust,* and then we are further to presume, in contradiction to the law, as just stated in the case of *Bishop and Rowe,* either that the bills have been actually paid, or that the partnership has been guilty of some laches by which the defendant has been discharged. We can do neither: if either fact existed, it was for the defendant, on the authority of the case of *Bishop and Rowe,* to prove it by evidence.

Upon less solid grounds even than these bills, stands the claim of credit for the two bills mentioned after in his (defendant's) letter in the following terms:—

"You hold two drafts for £100 each, Button on Button, Davies on Davies, the former I am imformed by the drawer has been honoured, which I trust will be the case with the latter."

It appears by these very bills filed in the case, that neither of them was honoured, and that the latter was noted for non-acceptance, the drawer appearing to be a banker of the name of Dodeehnam, not Davies as in the letter.

But surely no man who reads this letter can avoid seeing, that the defendant had little hope of these being available bills. He does not claim credit even for that which he supposes to have been honoured, and his language is evidently that of a person who looked upon them as very unlikely to be productive. But the fact is that they have not been productive, and we see no grounds for imputing such laches to the plaintiff as to oblige him to take this paper as payment for his goods furnished to the defendant.

We have purposely abstained from considering the plaintiff's letter filed in this case—it would of itself be a full answer to the defence—but we have taken up the subject upon the broad principle of commercial law, that when a bill is given in payment, it is not a discharge of the debt until it is actually paid.

Judgment for plaintiff £929 3 3, with interest at 5 per cent. from November 22nd, 1814.—(Per *the Supreme Court of Judicature*). 1821. Jany. 29.

April, 26.

Present:—GIFFARD, C. J. AND OTTLEY, J.

Dormiux vs. Kriekenbeek.

April, 26.

1. It is no objection to an action on a contract of marriage that the plaintiff is a pauper.

2. Remedies for a breach of promise of marriage.

3. The object of damages in such a case.

In this case the plaintiff sues, by her father and guardian, to oblige the defendant to fulfil the contract of marriage; or to pay damages for the breach thereof.

It is fully proved that such a contract was entered into; it was ratified by the consent of the parents on both sides; the parties are related to each other, so that no objection could lie on the score of family; and though it appears, by his suing in formâ pauperis, that the father of the plaintiff has no property, that is expressly rejected by the Civil Law in the consideration of a contract of marriage.

The contract thus entered into obtained, (still further and at the repeated instance of the defendant himself), the sanction of Government: a license was obtained and nothing then remained but performance of the ceremony. A time for this purpose was appointed, the defendant directed a house to be hired for the few days which it would require him to be at Jaffna, the place of the plaintiff's residence; and preparation, perhaps not very costly, but certainly some preparations, by plaintiff's father, were made for celebrating the marriage.

From whatever motive, the defendant suddenly retracted: he failed to come to Jaffna at the appointed time, and on a vague intimation that he did not think he could be happy with the plaintiff, declined to fulfil his engagement. Whether this was mere caprice, or whether the defendant has been misled by others, the Court does not enquire, he must suffer for his breach of contract.

There are two ways in which the Court might proceed: (1) it may either decree that the defendant shall carry the contract into effect by a marriage celebrated *in foro ecclesiæ* on or before a day to be named, under the penalty of imprisonment for his disobedience, and until he should submit and fulfil his contract; or (2) it may award damages to the plaintiff's action, with a stay of execution, until a fixed period, before which time the defendant might be permitted to fulfil his contract. The first course might on many accounts seem harsh, particu-

1821. April, 26. larly in compelling a person to a union with one, to whom he felt utterly averse. The Court would therefore desire to avoid it. With respect to the second, while it would give the defendant an opportunity to repair his error, it would eventually secure to the plaintiff some reparation for the injury, if persevered in.

It has been said that the plaintiff was put to little or no costs and sustained no injury.

As to costs it matters not: it is not remuneration for expences, but for injury to reputation and feelings, which it is the object of the Court to secure. And there can be no more severe wound to the feelings of a modest and reputable woman than this capricious rejection of her, after a solemn undertaking to make her his wife.

To secure these objects we think that one thousand Rixdollars are not too large a sum; that sum we award to the plaintiff with costs, and stay of execution until the first day of July next.—(Per *the Supreme Court of Judicature*).

July, 23.

Present:—Giffard, C. J. and Ottley, J.

Boyd, *vs*. *Bennett*.

July, 23.

(No. 3,726.)

1. A defendant is not necessarily concluded by the oath of the plaintiff.

2. The drawer of a bill of exchange, payable to a third party, is entitled to notice of dishonor.

This is an action brought by the plaintiff, as attorney of Stewart, to recover £217 17 2¼ British money on an account. In that account, is contained the sum of £166 10, for a bill of exchange, drawn by the defendant on his wife, which has not been paid.

The whole account has been (on the requisition of the defendant himself, in terms of the Charter) sworn to by the plaintiff. When the defendant proceeded to impeach some of the items of this account, the Court was called upon by the plaintiff's Proctor to reject any evidence tending thereto, and a case of *Koelmeyer vs. de Haan*, decided in this Court in August last, was cited, and relied upon as having established the rule, that when a defendant has called for the evidence of the plaintiff, he is concluded by it.

I have looked into my notes of that case, which are pretty full, and I trust accurate, and I have searched my memory with as much anxiety as possible to trace my recollection of

this kind, and I do not find in either, the slightest ground for supposing that such a decision was made. 1821. July, 23.

The case of *Koelmeyer* vs. *de Haan* was decided on the evidence furnished by the plaintiff, and on his own oath called for by the defendant, but not a word appeared to justify the reference which the plaintiff's Proctor has made. He was in that case the defendant's Proctor, and as he is not remarkable for yielding very readily to the opinion of the Court, it is hardly to be conceived that he would have suffered such a rule to be made, without opposition, or if he had made opposition, it should have been done in so weak and careless a way, as to have escaped both my notes and my memory.

But there is a better reason, why this decision could not have been made, than any depending upon our fallible recollection. It is not law, it is not common sense, that the oath of the person most interested in deceiving the Court, if there be deception, should be thus implicity received ; uncontradicted, it stand as evidence, only because the opposite party has made it so,—but it must, like all other testimony, be open to explanation or contradiction.

The plaintiff having thus established a *prima facie* case by his own oath, the defendant makes his objections.

The first is to the bill of exchange, that no proof has been made of notice of its having been dishonored, to which as drawer, he was entitled.

This we hold to be a valid objection to the bill—and had the action been founded on that only, we should have dismissed the plaintiff's libel.

But the sum for which the bill was passed, forms also an item of the account sworn to, so that, as part of the account uncontradicted, it must stand. The difference to the defendant will be, that he will not have to pay the interest, and charges due upon the bill, as he would have had, in case it had been regularly protested, and due notice given to the drawer.

The next point upon which the defendant contests this account, is the charge of £120 for the passage of a young gentleman, who has been examined.

It is very clearly in proof that the accommodation for which this sum was promised, and in part paid, was not afforded ; that instead of a cabin to be taken of the Captain, in which he would have been comfortably situated, *Mr. G. Bennet* was, for a part of the voyage, obliged to use a confined and very inconvenient berth upon deck, and for the remainder, to take share of the defendants. It is not reasonable that those who fail to fulfil their own contracts, should be permit-

1821. July, 23.

ted to exact the full amount of the remuneration, which has not been earned.

The only difficulty with the Court is, to ascertain how much of the passage money should be deducted, to answer this breach of contract. The sum paid for his board, as I understand *Mr. Jones*, was eighty guineas; we think that this being allowed for *Mr. G. Bennet*, we shall very nearly reach the truth, and we therefore are of opinion, that making some slight allowance for such slight accomodation as he had, we should deduct forty pounds from the charge.

The charge for the wine has been by the plaintiff's own letters, utterly disclaimed; he cannot now elect to be the creditor of the defendant for this wine, having once declared that he was not, that he had no concern with it. It must be altogether deducted.

Judgment for £166 17 2¼ with costs.—(Per *the Supreme Court cf Judicature*).

July, 23.

Present:—Giffard, C. J. and Ottley, J.

Gibson, vs. Executors of Fretz.

(3,619.)

Executors are entitled to their actual expenses and to a per-centage on the property collected.

This case comes on in the way of exceptions to the account filed by the executors of the late Mr. Fretz. We have heard these exceptions discussed on both sides, and have ourselves examined them with our best attention.

The sums excepted to are very considerable. The estate was a very considerable one, and the executors have had much labour and difficulty. It is our duty to see that, on the one hand, the estate is not wasted, and on the other, that the executors be fairly remunerated.

The executors have each a very considerable legacy as such, and they probably have a further claim for percentage on the property collected. Their actual expences too are to be fairly and liberally allowed them, but beyond these points the the Court cannot go.

It therefore feels itself obliged to disallow the monstrous charges for framing accounts and making statements and copying inventories, all which are, as it conceives, fully compensated by the allowances made for clerks.

It disallows the enormous charge for percentage, on managing the transactions of the estate, made by one cf the executors, for a period in which he confesses himself to have been receiving a salary, on the very same account; and it disallows the charge made for keeping up an establishment for part of the family, all of whom are legatees, at the expence of the other members of the family. 1821. July, 23.

The 2nd 4th and 6th exceptions are allowed.—

The 8th with the exception of 540 Rixdollars. The 10th 11th 12th 13th 14th 15th and 16th are also allowed.

With costs against the executors personally.

July, 30.

Present:—GIFFARD, C. J. AND OTTLEY, J.

Giffening, *vs*. *Vanderstraaten*.
(2,017.)

The King, *vs*. *de Heer*, *and Vanderstraaten*.
(3,171.)

The King, *vs*. *de Heer*, *and Vanderstraaten*.
(3,172.)

July, 30.

A Judgment, confessed to the Crown, evidently without consideration, by a debtor, in fraud of his other (real) creditors, is valid as between himself and the Crown, but invalid as against his other (real) creditors.

In these cases, the first of which has been eight years depending in this Court, it is now our duty to pronounce judgment.

All the interests concerned seem now to be fully before the Court and all the facts fully within its cognizance.

The first suit in point of order is that brought by the administrator of Mr. B. A. Giffening to recover from Mr. P. V. Vanderstraaten a sum of upwards of 26,000 Rixdollars due to the Intestate. This suit was instituted April 20th 1813, and after an ineffectual attempt of the defendant to delay it by a plea of a pending petition for Cessio Bonorum, judgment was on the 7th July given for 21,971 Rixdollars and execution awarded. The petition for Cessio Bonorum still however depending, the plaintiff was prevented from deriving any advantage from his judgment, until the prayer for the Cessio was withdrawn in June 1814. The execution however was carried into effect and the sum of 4559 7 3 paid into Court.

This prayer of Cessio was filed by the defendant on the 7th of July 1813, the very day on which the judgment was pronounced against him. In the mean time, and before the prayer was withdrawn, an information was filed, November

1821. July, 30. 10th, 1813, at the suit of the Crown against the defendant, as security for the arrack rent of Negombo for the year 1811–12, claiming the sum of 4,737 Rds. 11 fs.

The agreement of the arrack renter with Government was produced, by which it appeared that two other persons, Vandenbosch and Pieris, were securities to Government, but a paper was filed December 20th, bearing date May 4th, 1811, by which the defendant engaged to answer for any arrears to Government. To this information the defendant gave no opposition whatever, and judgment was given for the Crown for 6,011 Rds. on which execution was awarded, and there appears appended to the proceedings the order of this Court to pay the sum of Rds. 4,747, levied by that execution, to Government for the use of His Majesty, and the receipts of the Collector shew that this was done.

By these means, the estate of Giffening was prevented from reaping any advantage from the judgment delivered in its favour in 1813 until January 1817, and in that month when (the Crown being apparently satisfied), Mr. Giffening might have hoped for execution, a new delay was interposed by the guardian of Mr. Vanderstraaten's children coming forward to claim their maternal share of inheritance. This claim Mr. Giffening opposed by intervention, and demanded an investigation as to the state of the defendant's property at the time of his wife's death, an investigation which occupied a considerable period of time.

Before the report of the commissioners appointed to this investigation was made, two new suits were instituted by the crown against the estate of the defendant, one for a balance said to be due on the execution in the former case, and the other for arrears of rent of the year preceding that for which the former suit was brought.

In these cases it is stated, and not denied, that Mr. Giffening desired leave to intervene for his interest, that the presiding judge was new to the business of this Court, and unfortunately permitted himself to be misinformed by an officer of the Court as to the practice, and that Mr. Giffening was deprived of the opportunity of shewing that the Crown had no real demand on the property of the defendant.

Judgment was accordingly pronounced for the Crown and execution awarded, 30th June 1819. Upon this execution, a motion was made, 22nd July 1819, stating that the sum of Rds. 9311 4 2 remained in the Treasury, the balance of the former execution. Soon after Oct. 1819, the guardian of Mr. Vanderstraaten's children and Mr. Giffening intervened for the several interests.

In April last, 6th April 1821, the commissioners made the report as to the state of Mr. Peter Vanderstraaten's property at the time of his wife's death. By that report, the balance to his credit on the 31st January 1805 stood at Rds. 693 7 3, of which a portion belonged to himself, and the maternal share of the children is diminished to Rds. 277 5 2 instead of Rds. 4807 claimed by the guardian, on the foot of an account filed by Mr. P. Vanderstraaten in 1807.

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This is a chronological statement of the progress of these several cases, from which we observe that the administrator of Giffening, who had in 1813 established a demand and obtained judgment for Rds. 21,971, has, by suit after suit successively arising, been prevented from receiving any advantage from that judgment for 8 years.

The question for the Court is in the first instance the claims of the intervening parties.

That of the administrator of Giffening is founded upon an unimpeached judgment of this Court given 8 years ago; that of the guardian of Mr. Vanderstraaten's children, upon an account furnished by Mr. P. Vanderstraaten himself, two years after his wife's death, and stating the sum of Rds. 12,019 to be the amount of his property on the 31st January 1805, to 480 Rds. of which his children would be entitled.

This claim we have directed commissioners, totally unconnected with the parties, to examine. They have done so minutely: they have examined the book, account and papers, as furnished by Mr. Vanderstraaten himself, and they have carefully balanced all his several concerns; the result is that instead of 12,019 Rds. his whole credit on that day did not exceed Rds. 693. 7. of which it should seem that he himself would be entitled to 416 2 1 and his children to 277 5 2.

To this report objections have been made of a very extraordinary nature, that the commissioners, having made some allowances of items only supported by the defendant's own assertion, were bound to admit all his assertions, but it is obvious that many items might be such as to be in themselves indisputable, to contest or investigate which would be idle or or unnecessary; while others supported by bare assertion would require some strength of proof to give them credit. If every item of an account, referred to proper and uninfluenced persons for examination, is to be disputed and investigated afresh at the bar, this litigation, scandalously protracted as it has been, would be only now in its commencement.

It is our decided opinion that the report of the commissioners is that upon which we should act; the only proof

1821. July, 30. offered in the case is the assertion of the defendant, and every item allowed is almost gratuitous on the part of the Court, and in fact only admitted by the Court in favor of the children, in the absence of better evidence. We can therefore only pronounce the guardian to be entitled to the sum of Rds. 277. 52, with an equal sum for interest from the 31st January 1805. This sum we conceive to have a preference to the debt to Giffening's estate, and to be payable in full so far as respects that estate.

Having thus settled the question as to the children, we come to the judgments on behalf of the crown.

It has already been stated that the administrator of Giffening was prevented, by misinformation given to the judge, from intervening in the cases which led to these judgments, and it is asserted by Mr. Giffening that his object was to show that the whole proceedings were founded in a fraud of Mr. Peter Vanderstraaten, who, by confessing these debts to the crown, sought at once to deprive him of the fruit of his judgment of 1813, and to screen at the same time a friend of his own, the real debtor to the crown.

It was a question of some difficulty with us whether, as these judgments had been given for the crown by a competent Court, we had power to enquire into the consideration upon which they were founded, or to entertain the question whether they were tainted with *fraud.*

We have considered this question anxiously, and we find ourselves supported by authorities in the conclusion to which we have come, that, although, as between the Crown and Mr. P. Vanderstraaten, these judgments must be and always continue to be valid, yet that as against third persons, creditors of Mr. Peter Vanderstraaten, they cannot avail, if they appear to have been founded in fraud. And in our view of the case we are forced to believe that every step of Mr. P. Vanderstraaten's proceedings, as towards the estate of Giffening, has been marked by the *most scandalous* fraud.

The first attempt at fraud was the interposition of a petition for a Cessio Bonorum, to delay the suit brought by Mr. Giffening to recover the amount due to the Intestate's estate, and this in the teeth of his own account signed by himself and filed by the plaintiff. Defeated in this, and execution awarded against him, he (1813) interposed a petition to stay the execution, on the ground of the depending Cessio. Before the Cessio is abandoned, he comes forward to admit a debt claimed by the Crown, of which no evidence whatever was given but a short note written by himself and produced after Giffening had judgment, by which of course his property

was bound, and it is remarkable that this note is filed on the very day, 20th December 1813, on which he also filed his account as required in the process of Cessio Bonorum. 1821. July, 30.

I make this remark, because, in looking through his first accounts filed on lodging the petition, I discover no acknowledgment of any debt or security to the Crown, although in the account filed on the 20th of December 1813, there is a sort of casual notice at the foot of the account stating his liability to those demands.

If is further remarkable that his name does not appear to any formal instrument as security for the rent claimed; on the contrary the contract with the renter states two other persons to be the security, but Mr. P. Vanderstraaten says he was counter security for these persons.

Whether he was so or not, it is quite clear that he has interposed to favor those persons, at the expense of the creditor who had judgment against him, for although he might have demanded (if he were security) the privileges given by the law to a security of requiring the discussion of the principals, he has not done so, but immediately passed himself into their places by this admission; whether this admission, if then contested, would have been held valid against his other creditors, it is not necessary to inquire. The suit terminated in judgment and execution, and it appears by the records of this Court, that the execution was satisfied.

We now come to the suits, still depending. One of them is for a balance of the very execution thus recorded to be satisfied: this too without any hesitation is admitted by Mr. Vanderstraaten. As against him, this admission is valid; as against his creditors, we are of opinion that it is fraudulent and unavailing and evidence of gross fraud in the defendant.

The second Crown case now depending is, as I have stated, for the rent of a year previous to that decided in 1813: how this has happened it is not for us to enquire: the officer of the Crown does his duty, according to his direction; but here again we have to lament that the plaintiff was not allowed to intervene. There is not a shadow of evidence in the case that the defendant was security excepting his own admission, upon which little reliance can be had, and a letter of his own writing eight years after the transaction and five years after Mr. Giffening's judgment, containing a similar admission; and so far from Mr. P. Vanderstraaten appearing by any other evidence to be security for this rent, the proceedings of the Provincial Court of Colombo have been given in evidence, by which it appears that two other persons are at this moment actually sued by Government in

1821. July, 23. that jurisdiction, as securities for the very rent in question.

If to all these acts of Mr. Vanderstraaten were added the striking fact of his endeavouring by a mis-statement to secure the sum of Rds. 4,807 for his own family, to the injury of his creditors, we complete the picture of complicated fraud which the cases present on every side.

There is one circumstance to which, for the sake of an individual holding a very confidential office in this Court, we must advert. When these cases first commenced, and strong imputations of fraud were made, as they were from the beginning made, against Mr. P. Vanderstraaten, it was the positive direction of the late Chief Justice, that the Registrar, Mr. Vanderstraaten's brother, should abstain from acting officially in any instance where Mr. P. Vanderstraaten was concerned. The caution became the wisdom of that excellent judge, and we are happy to believe has been rigorously observed by the Registrar, throughout the whole transaction. As guardian of his brother's children, he could not help allowing his name to be used, but any further we are convinced that he has not interfered. In the instance of misinformation given to the judge, it was by another officer, and we rather attribute it to ignorance than design.

In making this decision it should be clearly understood that it does in no wise invalidate the judgments obtained by the Crown against Mr. Peter Vanderstraaten ; as against him they are in full force, but the utmost length to which we go is to declare that Mr. P. Vanderstraaten could not, by a fraudulent confession of a debt to the Crown in 1818, take from the administrator of Giffening the fruit of his judgment obtained in 1813, on which execution has been had and the money levied, and since that time detained in Court, merely to answer the demand of Mr. Vanderstraaten's children.

It is our decision therefore that of the amount now in the Treasury, the sum of Rds. 277. 5. 2. (doubled for interest) be paid in full to the guardian, his debt having a preference, and the balance to the administrator of Giffening's estate, with their costs.—(Per *The Supreme Court of Judicature*).

1822.

January, 19.

From THE PROVINCIAL COURT OF GALLE. } Nos. 5629 and 5790.

Dona Clara vs. Dona Maria. *Annona vs. Dona Maria.*

1822. Jany. 19.

It is ordered that the following judgment [in the above cases] of *The High Court of Appeal* in the Island of Ceylon, drawn up by the Honorable the Chief Justice, Sir Hardinge Giffard, be entered in the records of this Court :—

1. An administration, obtained by a mis-statement, may be repealed, and new letters granted to the next of kin, upon proof of proximity.

2. The Law of Succession in Ceylon depends upon a Resolution of the local Government, dated December 20th, 1758, promulgating the Placard of 1599, which adopted the *Aasdomsch Code* as the law prevailing in *North Holland*, and according to which, the rule of inheritance was the same as in English Law viz : that

These cases are intimately connected with each other : the same person is defendant in both, they relate to claims upon the same property, and the grounds upon which my opinion is founded go to decide both. It was my wish in the first instance to have avoided the consideration of these cases, as I had been formerly an advocate in behalf of the original respondent, but I find myself obliged, by the Charter of 1802 § 188, to act, the value of the property in question exceeding 2000 Rds. in value.

The consideration of these cases has given me more trouble than I remember to have found in any matter which has ever yet come under my view, and after all, I do not perhaps feel that the conclusion at which I have arrived will be satisfactory to all.

The respondent, Dona Clara, brought her suit in the Provincial Court of Galle against the appellant, Dona Maria, who had obtained administration as next of kin to Don Simon De Silva, a person who died without a will and possessed of considerable property, Dona Clara asserting herself to be nearer of kin and therefore entitled to the administration, which had been obtained by a contrary representation of the appellant.

The first observation, which the case presents, arises out of the application of that part of the English Law, by which administration is granted to persons and property otherwise governed by the Dutch Roman Law, to which that proceeding is wholly unknown. How the practice of granting administration by the Provincial Courts, first obtained in this Island is

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the nearest in blood should succeed, whether the kindred were on the father's or mother's side.

by no means clear. I find no Regulation of Government to authorize it with respect to these Courts. The Charter of 1801 gives the power to the Supreme Court, and I suppose that it was, on the suppression or discontinuance of the *Weiskamers,* found necessary in the inferior jurisdictions to appoint some ostensible person as the trustee of Intestate's estates, for which purpose the process of administration appeared to be, and was, adopted as the most convenient.

It has now however been established, and must be taken to be a part of the settled Law that administration may be thus granted, and though there be no direct enactment on the subject, we must also suppose these administrations to be subject to the same rules, in granting and repealing them, as prevail in the Law of England. By that law, it is certain that an administration, obtained by a mis-statement, may be repealed, and new letters of administration may be granted to the next of kin, upon proof of proximity of kindred. *Harrison* v. *Weldon* Str. 911; Com. Dig. *adm.* (B. 8).

By her libel, the respondent stated herself to be next of kin to the deceased, and in the course of the proceedings, she is stated to be the daughter of Daniel de Silva, the brother of the Intestate's father, or in other words, his first cousin by the father's side, or in the words of the law, related to him in the third degree. Those who join her in the suit stand in the same degree of relation to the deceased, and have a life interest with her.

The appellant does not deny this kindred of the respondent; on the contrary, it is admitted by her throughout. But the appellant, stating herself to be next of kin to the deceased on the side of his mother, insists that, by the law of succession in this Island, the property of the deceased ought to be divided into two equal shares, the one to go to his next of kin by the father, the other to his next of kin by the mother, and although she herself stands no nearer in relationship than as fourth cousin, or in the fifth degree, being the great grand daughter of his *great-great* grand father by the mother's side, yet that, as sole next of kin on the mother's side, she is entitled to that half share. And for this she relies upon the Law of Holland as prevailing in Ceylon. It is therefore necessary to look into that law, and to see to what extent it operates with respect to succession in this Island.

When a number of small States were combined into one Federal Republic and formed the United States of Holland, every one of them adhered most pertinaciously to its own particular institutes, and almost as many different laws and customs prevailed as there were town and villages in the new

Republic. This produced very sensible inconvenience, and attempts were made, not always successfully, by the Sovereign authority of the United States, to produce something like an uniformity of laws in some respects, but in others they totally failed, and up to our own time, very striking differences existed in the jurisprudence of districts, lying almost interwoven and entangled into each other. But it was with respect to the law of succession that the greatest struggle was made, for with respect to that law the most remarkable distinctions existed.

By the code called the *Aasdomsch Law*, which prevailed in North Holland, the rule of inheritance was the same with that of the English Law, that the nearest in blood succeeded, whether the kindred were on the father's or mother's side. The *Schependomsch Law*, which prevailed in South Holland, assumed it as a rule, that the property had descended equally from father and mother, and therefore required that the property of the deceased should be divided, one half to be inherited by the next of kin on the part of each parent, although it should be to a first cousin by the father, and a tenth by the mother.

The Rule of the Schependomsch Law was expressed in an axiom: *goods return whence they come*, and the Aasdomsch by another: *the next of blood takes the goods*.

Two rules so conflicting, and operating upon a people, becoming every day more wealthy and more intimately connected with each other, produced extreme inconvenience, and became, with other discordances in the laws, the subject of a Political Ordinance, issued by the States of Holland in the year 1580, by which a kind of compromise was attempted, though the prevailing principle adopted was the rule of the Schependomsch Law, the division of the inheritance.

Against this, however, there was no inconsiderable struggle, and an Interpretation was added in 1584, by which it was designed to render it more palatable to the dissentients, but this did not avail and in 1599, a Placard was issued, by which in effect the Aasdomsch principle was adopted in favor of the greater part of North Holland and some very considerable districts of the other states.

The Political Ordinance of 1580, with the Interpretation of 1584, is stated by Van Leeuwen (*Dutch Roman Law*, lib. 3. cap. 12. § 8.) to prevail in those parts of the East Indies, under the direction of the Dutch East India Company, and he particularly states that the Placard of 1599 is not to be extended to any place but those expressed in it by name. This would seem to have established the Political Ordinance, with its Interpretation, as the law to be observed in the East India

1822. Jany. 19. Settlements of Holland, or in other words, the Schependomsch code. But from some cause or other, we have no proof that it was generally acknowledged, whether it was that the law was not promulgated, or that the constant usage of making wills rendered it unnecessary to call it into operation. We have had great difficulty in discovering any precedent to prove what law was pursued. One precedent only has been discovered, and at first it appeared calculated to remove the doubts entertained on this subject: it was the case of *Van Cleef* in the year 1777.

In that case, the succession to the deceased's property was claimed by his widow and fifteen relations. The right of the widow could not have been in question: it was secured and established by the *Communio Bonorum*; and the fifteen relations appear, on examination of the record, to have been all on the father's side; but the Weeskamer having requested generally directions as to the law of succession, Judges were appointed to examine and report upon it, and they found that the law of succession in Ceylon depended upon the Charter granted to the Dutch East India Company in 1661, the Political Ordinance of 1580, the Interpretation of 1584 and the Placard of 1599, promulgating the Aasdomsch Law of succession of North Holland. And for the authority of this decision, the Judges referred to a Resolution of the Government of Ceylon of December 20th, 1758.

That Resolution, which bears the appearance of a legislative act and is thus recognized as such, recites the existence of the very doubts now under consideration. It recites that the Governor had referred to the Great Placard Book for the Charter on the subject granted to the East India Company in in 1661, and had submitted that Charter, *with the Documents relative thereto*, to the members of Council, to declare whether they knew of any subsequent law respecting successions. To this they had replied in the negative, upon which he, the Governor, had resolved to insert the said Letters Patent with the *Documents relative thereto*, viz: the 59th Act of Orders dated 13th October 1621, the 52nd dated the 23rd August 1636, the Political Ordinance of April 1580, the Interpretation of 1584, and finally the Placard of the *same date* (evidently referring to that of 1599, which is accordingly given at full length); and the Resolution goes on to say that exemplification of the Letters Patent and of other recited documents should be issued to the Court of Justice, the Civil Courts &c., of Ceylon, *for their guidance and due observation*; and, as I have before observed, the Placard is one of these documents.

That Placard is totally at variance with, and, where it

operates, in fact repeals, the Political Ordinance and the Interpretation, for after making a few regulations for cases of parents and children of the half-blood, it goes on to declare in the fourteenth section that all other successions provided for here above shall be regulated according to the true written law, meaning the Imperial Civil Law.

It is however observable that the Charter of the East India Company does not include this Placard in its recital. At first I thought this might be a clerical omission in our copies, but upon reference to the Great Placard Book, I find that it was not contained in the original.

The authority of the Placard, as the Law of Ceylon, depends then totally on the Resolution of Council in 1758, and the expression of sending it to the Courts for their guidance.

We have no assistance whatever from any thing in the report of *Van Cleef's case*: the distribution there made would seem to follow the Placard, but then there do not appear to have been any claimants but those on the side of his father, so that it does not indicate a preference of the one law to the other.

The quotation from *Van Vorm* of a decision made in 1733, by which the property of an Intestate in the East Indies was distributed according to the Political Ordinance, is by no means inconsistent with the establisment of the Placard in Ceylon in 1758, if we suppose that the Resolution of Council of that year was intended to have the effect of a Legislative Act, as in *Van Cleef's case* it appears to have been considered.

The Statutes of Batavia and their applicability to Ceylon.

In *Van Cleef's case*, as reported from the Records of the Dutch Court of Justice, there is a reference to the old statutes of Batavia, as corresponding with the Law of North Holland. In looking into that collection, I find it so exactly corresponding, that the Placard of 1599 is literally copied in it as the Law of Succession in India. This collection is a digest, and apparently a very excellent one, of the laws by which the Indian Settlements, under the general superintendence of the Council of Batavia, were to be governed; and its authority seems to be recognized by this decision of 1773. It is however in point of date anterior to the Letters Patent of 1661, and here the difficulty again arises from these Letters Patent.

It would have been satisfactory to my mind, and perhaps have thrown some light upon this subject, had I been able to discover the mode of adoption of the Statutes of Batavia as the Law of Ceylon, or the nature of the authority of the Council of Batavia in legislating for this Island; but on directing the Keeper of the Dutch Records to search the Secre-

1822. Jany. 19. tary's office for information on this subject, he reported that the clerks of the office had informed that the like enquiry had been made, by direction of my predecessor, Sir Alexander Johnston, but without any success.

The endeavour to discover, from the records of the Inferior Courts or the recollections of the practitioners, what was the prevailing law upon this point in Ceylon, has been equally unsuccessful: the records offer no such case, and even where the question has not been wholly misunderstood, the answers of those practitioners have been vague and unsatisfactory.

Little reliance is, I know, to be placed upon the evidence of many of those who have deposed in the cause below as to the kind of law which has prevailed in this Island, but it is remarkable that the practitioners examined on oath at Galle were unanimous, and that not one swears to the prevalence of any other rule of succession than that which agrees with the Placard. Neither has any precedent of a contrary mode of succession been adduced. That which has been produced only shews a mode of division common to both laws.

In the absence of fuller information, we are therefore called upon to decide upon the narrow ground of whether, by publishing the Placard for the guidance and due observation of the Courts, the Governor of Ceylon did design to promulgate the Placard as law, and finding as I do no proof to the contrary, in any precedent of a proceeding or decision on the subject, but meeting with its recognition in direct terms in the only case which has been discovered, and collecting, as far as we have been able, the general sense of the persons conversant in law matters in accord with the opinion, I conceive that we are safest in declaring that Placard to be the law of the Island. In doing so too, we will have the satisfaction of establishing the similarity of the law of succession to our own; we shall not disturb any decision or proceeding hitherto had, and what is most gratifying of all amidst these difficulties, it is a case in which the parties may have the judgment of another tribunal to correct, if necessary, that which is pronounced here.—(Per *The High Court of Appeal*).

January, 28.

Present:—GIFFARD, C. J. AND OTTLEY, J.

Huxham, *vs*. *de Waas*, *et al*.

(3,845.)

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This suit is brought for the sum of Rds. 36,938. 7, with interest at 12 per cent. from the 15th September 1821, being the balance of an account current between the plaintiff and the defendants, struck on that day.

1. An account stated and acknowledged, is conclusive, except where strong imputations of fraud or usurious dealing are made, in which cases it is incumbent on the Court to open it up, and examine particulars thereof.

2. Even in the absence of such imputations, accounts thus stated and acknowledged, may be opened up, if the whole series are voluntarily brought before the Court, by the plaintiff.

To the *libel* is annexed the account referred to, signed by the defendants, who have admitted their signatures. Their *answer* denies being indebted in the balance stated, but admits a balance of Rds. 16,142. 11, as stated in an account filed by them. The *replication* of the plaintiff denies the accuracy of the account furnished by defendant, and insists on the balance admitted by them on the 15th September. The replication then goes into a statement of the plaintiff's case. By that statement, it is charged that the defendants were originally indebted on a notarial bond, dated 3rd March 1820, for the sum of Rds. 64,000, in discharge of which, they had, from time to time, paid Rds. 2,761. 5, leaving a balance of the Rds. 36,938. 7 claimed in the libel. The replication then adverts to a charge of Rds. 13,127. 6, made by defendants for teak sent to the Cape of Good Hope, which it alleges to have been a transaction in which the plaintiff had no concern, further than recommending the defendant to the agent; and to a charge of Rds. 100 per mensem for godown hire, which he states to have been settled, and acknowledged by defendants to have been satisfied, by a nominal payment of one Rixdollar per month; and what is most material to this present case, the plaintiff annexes to the replication monthly statements of the accounts and balances signed by the defendant from 1st of July 1820 to 1st of January 1821. These monthly accounts are marked from F to K inclusive. There has also been put in by each party a copy of an account commencing December 3rd, 1818, and ending June 30th, 1820, which appears to contain the dealings between the plaintiff and defendants to that date, when the balance is taken up and carried on in letter F and the subsequent monthly accounts. And there are two papers put in by plaintiff, the one an undertaking of the first defendant to furnish oil, and the other to furnish coffee to the

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plaintiff. This and some parol evidence as to the value of the godown rent, and the prices of oil and coffee in 1820, form the whole of the pleadings in this case.

On the part of the plaintiff, it has been strongly urged that the account of the 15th September 1821, signed by the defendants, is conclusive against them, and that, upon this point, he ought to have judgment, inasmuch as an account stated cannot be opened or impeached.

It is certain that, for the general security of persons in trade, an account thus stated and acknowledged would be considered conclusive, unless strong grounds were laid to induce a Court to investigate the items. These grounds may be a suggestion of fraud, satisfactorily supported and not sufficiently denied, or an imputation of usurious dealing, similary made: in either case the Court would be bound to an examination of the particulars. But we are, in this case, relieved from the necessity of entertaining such imputations against the account, by the plaintiff himself having produced and filed the whole series of account from 3rd December, 1818, and thus subjected the items to the consideration of the Court. The foundation of the account then appears, not to have been the alleged bond for Rds. 64,000, but a series of transactions commencing at that date.

It appears that on the 3rd of March 1820, after their dealings had gone on for one year and a quarter, the defendants were induced to execute a bond for Rds. 64,000, as for so much money borrowed from the plaintiff, at an interest of 12 per cent., and on the 30th June following, to which the accounts goes on with other charges and discharges, the actual balance stated against the defendants appears to have been Rds. 55,226.

In fixing the sum of Rds. 64,000, it does not appear that the parties made any reference to the account. No such balance appears in any stage of it, and the bond would, therefore, appear to have been intended, rather as a collateral security for any balance of account, than an actual contract for the discharge of Rds. 64,000 borrowed by the defendants. This furnishes us with another inducement to examine the particulars of this account.

In looking into it, we are first struck with two items, of Rds. 15,000 and Rds. 4,000 respectively, being penalties for the non-performance of contracts. This, so far as the sum of Rds. 19,000, directly contradicts the assertion of the bond, that this sum was lent to the defendants by the plaintiff. We will not call this an actual fraud, but it is such a mis-statement as must alarm us in the outset of the proceeding.

We are then induced to look at the alleged contracts upon which penalties, so very severe, have been exacted: they are marked N and O. We shall first consider N. It is an undertaking of the two defendants to furnish 60 leaguers of cocoanut oil to the plaintiff, at Rds. 180 the leaguer, before the 31st December, 1819, under a penalty of Rds. 4,000: and this is dated July 1, 1819, and signed by the defendants only.

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It will be observed that this paper is only the act of one party, the defendants; the plaintiff is not in the slightest degree bound by it, he is no party to it. No consideration whatever is stated. Had oil fallen to half the price, the defendants could not have obliged the plaintiff to pay at the rate of Rds. 180. There is nothing mutual in the contract: it is utterly *nudum pactum*: and being on that ground void in law, the penalty must be void, which is founded on the breach of it. This item of Rds. 4,000 must, therefore, as we conceive, be struck out of the accounts.

A contract by A. to supply oil to B, under a penal bond, signed by A. alone, without any consideration stated, is a *nudum pactum*.

We now come to the paper O. It is dated the 24th of March 1819, and executed by the first defendant and the plaintiff: so that it stands differently circumstanced from N. It is a contract on the part of the defendant to furnish 5,000 parrahs of coffee, at 9 Rds. the parrah, before the 31st December 1819. It recites the advance of money by the plaintiff for the purpose, and is executed, as I have said, by both parties, and the penalty on failure, it states at Rds. 15,000. It appears on a reference to the accounts that none of the coffee was furnished within the time specified, nor was the whole ever delivered, but a part is entered as having been received in May 1820, and is credited to the defendants by the plaintiff *at the contract price*, while, according to the parol evidence given in Court, was from Rds. 3 to 4½ under the market price. From this, it is clear that, so far as the delivery went, the plaintiff considered the contract as still binding, and it is quite certain that so far as this amount of 879 parrahs, the penalty is by his own act remitted. It ought to be perfectly understood that in considering penal obligations like the present, Courts of justice are by law empowered to apportion the penalty to the amount of damage actually incurred. The plaintiff having by his own act adopted the delivery of 879 parrahs, as having taken place under the contract, he only crediting the contract price, the Court cannot consider him as entitled to any remuneration for damage to that amount. From the balance of the penalty, we go perhaps further than the strict law of the case might warrant us in saying, that it may be allowed to the plaintiff.

In penal obligations, the penalty ought to be apportioned to the amount of damage actually incurred.

We come next to the consideration, which may be of

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much importance to the parties, the question of interest. The penalties having been made principal, together with the advances made by plaintiff, the monthly accounts furnished to us exhibit constant balances against the defendants, to which balances the accruing interest being constantly added, and no credit for interest being given to the defendants for any payments made by them, the effect is that they are charged with interest upon interest, contrary to every principle of law.

This is our general view of the case on the accounts and documents furnished by the plaintiff himself. On the part of the defendant, a claim is made for the amount of teak wood sent to the Cape of Good Hope, Rds. 13,127. 6. We have already suggested that this charge against the plaintiff is untenable. It is clear from paper E. that the exportation of this timber was on account of the defendants only. Equally untenable is the amount for godown rent, which do not appear to have ever been suggested, until it was offered as a set-off against the present demand. The nominal rent is distinctly stated in the several accounts signed by defendants, and it is easy to conceive how it might have been an advantageous arrangement for the defendants. The claim cannot be supported.

Our judgment therefore is, that the accounts be referred to the officer of the Court, with directions to frame an account between the parties, upon the footing of those marked L and M; that in charging the defendants, the penalty of Rds. 4,000 on paper N be entirely struck out; that from the penalty of Rds. 15,000, a sum of about Rds. 2347 be deducted, being in the proportion of Rds. 879 to 5,000 parrahs, being the amount furnished deducted from the amount contracted to be delivered, that the claim of defendant to credit for teak wood and godown rent be disallowed; and that the account be made up, charging interest on both sides, until a balance shall be struck.—(Per *The Supreme Court of Judicature*).

January, 29.—*First Term.*

Present:—GIFFARD, C. J. AND OTTLEY, J.

Loret vs. Vanderstraaten.
Belisante, Intervenient.

(3,556.)

1822. Jany. 29.

Validity of a donation.

In the principal cause, judgment has been had against the defendant (the official administrator of the estate of Brock) for the sum of 2100 Rixdollars on a bond, and the property (of which the title deed was hypothecated) has been directed to be sold in execution.

The intervenient claims a part of the property which the Fiscal had seized in order to sell it under this execution. The property consists of a part of a garden conveyed to her by a donation deed of the Intestate dated November 17th, 1810. The bond upon which the judgment is founded was passed on 18th December 1817. The ground claimed by the intervenient is admitted to have been originally part of that included in the hypothecated title deed.

For the plaintiff it has been contended that this donation deed is void for various reasons :—(1) that the stamp it bears is below the value required by Regulation; (2) that the donation has been made *in fraudem creditoris*; (3) that, even supposing it a valid donation, it is still liable to the debts of the donor.

With respect to the first part, it is stated that the value of the whole ground appears to have been 1500 Rds., that the deed conveys about one third, and that of course it should bear a stamp of five per cent on 500 Rixdollars or 25 Rds. when in fact it has only one of fifteen. In order to sustain this objection we are called upon to presume that all the gronnd was of an equal value, of which we have no evidence whatever, and we should not find ourselves justified, upon any mere presumption of this kind, to say that an instrument, executed 12 years ago, was void as against the Government Regulations.

The next ground is that of fraud against creditors. To this fraud, the Notary who prepared the deed, and the surveyor who marked off the ground are asserted to have been parties. So very heavy a charge ought not to be made without something like a shadow of foundation. The Notary, as

1822. Jany. 29.

respectable a man as any in his station while he lived, is now dead. For aught we know, the surveyor may be dead : he is however no party to this case ; and this disposition to slander the dead and absent deserves strong reprobation, most particularly in the present case, when it is unsupported by anything like proof, and rests merely upon a difference in practice between the Notary of Galle in 1810, and a Colombo Notary in 1822.

To refute the charge of fraud, the decisive fact of the intervenient having been in the possession of the land, is further evidenced by her having raised money by the mortgage of it in her own name. But this very act is called a proof of fraud; for it is alleged that the loan was for the Intestate.

The answer to this is, that the allegation is unsupported by proof, and that the fraud, if there had been any, was the most harmless that could be imagined, for the money thus borrowed appears to have been honestly repaid. But it is alleged that the land was in mortgage at the time of the donation. Of this there is no evidence. The assertion is founded upon an inference to be drawn from a letter of the Intestate, and by no means judicially proved. But suppose it were, and that the donation had been in fraud of a creditor then holding a mortgage, there is nothing to connect that mortgage with the present plaintiff. His interest did not commence until some years after; his bond is dated in 1817 ; it is totally independent of the former mortgage to which it in no way refers ; and the plaintiff's connection with the land cannot be construed to commence earlier than the date of that bond.

Where a donation is made to the prejudice of a creditor, he has a hypothecary action against the donee.

To the last objection founded in a quotation from Kersteman, we answer that, looking carefully through the Codex *de revocatis donationibus*, 8. 56 §§ 1. 12, we find no such case of revocation as that alleged. If the meaning be that the creditor has an hypothecary action against the donee, let him institute one. She is not here as a defendant; she has not come in under any citation from him, and her interest cannot be otherwise affected than by a regular suit, for which, if there be any foundation, our decision in this case will be no bar to it.

We therefore pronounce judgment for the intervenient with costs.

April, 29.—Second Term.

Present:—GIFFARD, C. J. AND OTTLEY, J.

Rex vs. de Waas.

1822, April, 29.

(No. 3,842.)

The following is the judgment of Sir Hardinge Giffard, (Sir Richard Ottley dissenting):—

A, a debtor of Government, which held his property in hypothecation, entered upon the superintendence of its arrack farms, on the understanding that he was to receive, as his only remuneration, during the time of such superintendence, "the remission of the interest of his debt due to Government." Government took over, on its own valuation, the property hypothecated, and thereafter credited A with the interest of the reduced debt only. *Held* (the Court being divided in opinion) that A. was entitled to yearly credits for the interest on the debt as it

In this case the Law Officer of the Crown claims against the defendant, on behalf of His Majesty in his Government of Ceylon, the sum of Rds. 43,830, being arrears of arrack rent, and of collections made by the defendant for the use of Government.

The case is important as much from the magnitude of the sum sued for, as from the very disproportionate advantages which the one party may appear to have over the other, where the public interest is sustained by His Majesty's Government against an individual, and we may venture to say an insolvent merchant. But these advantages are only apparent; the principles by which this Court is governed acknowledge no distinction of person in the suitors who come before it, and, however our decree may affect the parties, this circumstance will not be found to have any influence in its formation.

What I have stated would in a great measure serve to account for the time which the Court, in its serious anxiety to do justice, has hitherto taken in deliberating upon this case, but I regret for myself that another, and to me a much less gratifying, cause has intervened. It is my misfortune, in my contemplation of this case, not to be able to see it in the light in which it presents itself to my learned and respected brother, and I have, with a very earnest desire to obtain the clearest view of the subject, hesitated from day to day in making up my final opinion in the hope that we should at length agree in our conception of the case. It is however upon a point so cardinal that our difference turns, that I see little hope of this desirable result; and were I in any degree less strongly persuaded of the justice of my own opinion, I should most gladly have yielded to his. But there is a length to which acquiescence cannot honestly go, and in this case without exceeding that boundary, we cannot on either part hope for unanimity. Having premised thus much, I shall state generally the outlines of the case as they offer themselves to me.

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existed at the time of his entering upon the management of the farms.

Mr. Barend de Waas, the defendant, had previously to the year 1809 been a renter of certain arrack farms from the Ceylon Government, and had fallen into arrear; his debt on account of this arrear was on the 31st March 1809, Rixdollars 55,035. How he had fallen into this arrear, it has been no part of our duty to enquire. It is indeed asserted at the Bar that he had endured losses in trade "enough to press a royal merchant down," but of this we know nothing nor need we. It only imports in the present case to know that he could not discharge this debt, though there is evidence in the case that a great part, if not the whole of it was secured by hypothecated property, then actually in the hands of the Government of the value of Rds. 50,000. Be this as it may, he lay at this period at the mercy of his powerful creditor, the King's Government of Ceylon. It so happened that his creditor, precisely at this moment, was circumstanced in such a way as to stand in need of his assistance. By a combination amongst the bidders for the arrack farm of Colombo, there seemed a likelihood that this valuable source of revenue would be seriously diminished. It was therefore determined to take the management into the immediate hands of Government, and Mr. De Waas, being a person skilled in the nature of this business, offered himself to conduct it, as their agent and servant, an offer which was wisely, and under the circumstances humanely, accepted by the Government of Ceylon, which assigned for his services as (to use their own words) the *only remuneration*, the remission of interest on his (then) debt, while he continued to act in this capacity.

The terms of this contract, for such I cannot but think it, are set forth in the Minutes of the 29th May 1809:—

"In recommending Mr. De Waas to this situation, Mr. Wood is aware that he is a considerable debtor to Government, but as he has mortgaged the whole of his property for this debt, and as he is a man of good character and has met with very severe misfortunes in his mercantile speculations, without any suspicion of impropriey or dishonesty on his part, he recommends his case to the favourable consideration of His Excellency in Council, and proposes that the *only remuneration* that Mr. De Waas should receive for his superintendence of the arrack farm, is *the remission of the interest of his debt to* Government *during* the time of his holding that situation."

The defendant's debt was at this time, as I have stated, Rds. 55,035; the monthly interest upon it Rds. 550; the annual interest Rds. 6,604. To my understanding, then, the Minute is a contract to remit to the defendant the sum of Rds. 550 monthly, or Rds. 6604 annually, (which he was then

bound to pay to Government), in remuneration of his superintendence of the arrack farm ; or in other words, his wages, as their agent or servant in this particular instance, were fixed at this amount by the party hiring him. In this employment he continued until December 1820, when in conseqnence of a failure in paying his monthly returns, the arrangement was terminated on the part of Government. 1822. April, 29.

Had the case come before us upon this statement only, the clear course would have been to charge Mr. de Waas with his original debt to the Crown, together with the subsequent additions, and further to charge him on the one side with the accruing interest on the original debt, giving him credit on the other hand for the amount of that interest in remission under the Minute of 1809.

It is then a question whether the defendant has done any thing to alter this state of the account. Have the labour and responsibility of the duties he undertook been so much lessened as to make it equitable that he should have the amount of the intended remuneration diminished? No such thing. In his zeal for the complete execution of this duty, he appears to have solicited to be burthened with further duties, connected with the original plan. He has discharged those duties, and, as it should seem, without imputation upon his diligence or activity ; so that without going the length of saying that he was entitled to additional remuneration, it is clear that there arises on this ground no reason whatever for diminishing the amount of his remuneration. Yet in the account upon which this suit is founded, this remuneration is diminished in a very serious degree, and the services, which in 1809, were estimated at Rds. 6,604 per annum, in a succeeding period of that account, though considerably increased in labour and difficulty, are supposed to be adequately remunerated by a monthly allowance of 310 Rds.

This is effected by an act of the Government itself. It has been mentioned that Government held some of the defendant's property in hypothecation : part of this consisted in a house, and part in a ship. It suited the convenience of Government to take these properties to its own immediate use and at its own valuation. It was not for De Waas, who was looking for favour, to make difficulties about the price, and accordingly he is credited against his original debt in the sum of Rds. 5,660 for the house, making together Rds. 23,600, leaving the original debt about 31,435 Rds. It is immediately upon giving him these credits that the account assumes, as it appears to me, a most inequitable from against the defendant. Instead of giving him credit thenceforward, as had been done before, for the remitted

1822. April, 29. interest upon his whole original debt, he is only allowed interest in remission on the balance, or, in other words, his wages are reduced, by this effort at discharging his debt, from Rds. 6,604, per annum, the original remission, to Rds. 3,700, the interest on the reduced debt, and this at the very period that his labours had been increased by the additional duties he had solicited.

Had these wages been actual payments instead of remissions in account, the defendant must have felt the pressure immediately. The reduction of income from 550 to 310 Rds. per month, could not but have alarmed and disturbed him. But standing, as it did, merely in account, and he knowing himself to be still in the power of his creditor, it is not surprising that he made no effort to remonstrate against it, even if he had been, of which however we have no evidence, informed that the account had assumed this new appearance against him.

Pursuing the principle adopted in this account, and supposing for a moment that the defendant was not aware of the manner in which those accounts were kept, or if aware, incapable at the moment of remonstrance, let us see to what oppression and absurdity it would lead. It might have happened that either by his own payments, or by the realization of the hypothecated property on the part of Government, his debt would have been reduced to the fraction of a Rixdollar, and in that case, upon the construction now given to the contract, he would have been entitled for his remuneration to the monthly interest of that fraction for his only remuneration. It is true that the defendant might have retired from so very unprofitable a service; but, construing the contract as I do, he naturally supposed that services valued in 1809 at 550 Rds. per month, and afterwards considerably enhanced in point of labour and attention, could not lose their value by the discharge of his original debt on any part of it; and he continued to render those services until he became unfortunately a second time in arrear.

It is upon this point that my very learned brother differs from me.* He considers that the terms of the Minute amount

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* Sir Richard Ottley's judgment on this point may be cited here:—

The only point, then, upon which a diversity of opinion exists between us is the following. The Chief Justice considers the defendant entitled to the annual sum of Rds. 6,604, under the order of Council of May 1809. I consider that he is only entitled to interest upon the reduced sum, after the payments were received by Government.

In forming this opinion, I have been principally influenced by the conduct and

only to an undertaking to remit interest on the balance as it should at any time stand. My opinion is that it must be a remission of the interest on the debt, as it presented itself to the persons at the time of making the stipulation. The reasoning of my learned brother, (assuming his construction of the contract), is perfectly just, but I cannot help thinking that he attributes a strange degree of improvidence to the defendant in supposing him to enter into such an engagement. But, says he, if this contract were equivocal, it was, on the principles sanctioned by the Civil Law, the duty of the defendant, against whom the terms would be construed, to have it rendered more explicit. It seems to me a full answer that it did not appear equivocal to the defendant; and, if my view of the contract be just, it is clear and distinct, and therefore no such duty was incumbent on the defendant.

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If a contract is equivocal, it is the duty of him against whom the terms would be construed, to have it rendered more explicit.

He relies upon the subsequent conduct of the defendant in presenting two petitions, without distinctly claiming credit for interest on the amount of his debt discharged, as a waiver of his right. In any case, I should require a very positive waiver to extinguish a right. *Nemo donare facile præsumitur*, Matth. de Prob. cap. 2; N. 10; is a maxim of the Civil Law. In this case the waiver is matter of inference merely; but how are we sure that at either period the defendant was aware of the manner in which the account was kept against him. All that he had occasion to speak of was the original debt which

To extinguish a right, the waiver should be positive, and not a matter of inference merely.

Nemo donare facile præsumitur.

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the representations of the defendant himself, and from considering that the defendant was never bound to continue to act for Government, but was at liberty to recede from his engagements at any time, when he thought the sum he was to receive inadequate to recompense him for his trouble; and I further think that if any ambiguity appeared upon the words of the contract, as it was his interest, so it was the duty of the defendant, to object and to have it expressed in such terms as would render it altogether unequivocal.

That the terms under which the defendant undertook the management of the arrack rent in 1809 are not expressed in the clearest language, must, I think, be admitted, and, not to multiply quotations from books, I think that the principle of the Civil Law is this: that the obscurities and uncertainties of the obligatory clauses are to be interpreted in favour of the person who binds himself, because it was the duty of the other party to take care to have clearly explained that to which he pretends a right. The language of the Pandects is this: *fere secundum promissorem interpretamur, quia stipulatori liberum fuit verba late concipere.* Dig. 45. 1. 99.

I do not mean that, situated as Mr. de Waas found himself, and having to deal with the Government of Ceylon, he could readily prevail in having an agreement drawn up with legal formality; but he might have made the attempt, and then we should have understood the meaning of the parties, or at any rate his meaning. Upon this argument, however, I place little reliance, because I think that the intention of the contracting parties ought, in justice and good sense, to regulate the construction of all contracts; and however defective the expression, if we find enough to manifest their intention, we possess the most equitable ground of decision.

1822. April, 29. he knew could not have been discharged, and so long as any balance remained, so long was he in the power of that creditor to whom he was both servant and debtor.

His conduct, while under these relations, must be viewed as influenced by them. His powerful and zealous friend, Mr. Wood, by whom his character stands so honorably recorded, was no longer in the Island. His principal dependence was upon the forbearance of his successor. A new officer had risen up which "knew not Joseph," and it behoved a petitioner to be cautious. His claim, if just, could not, I conceive, be affected by his not having then urged it, because it does not appear to have been necessary, and to have stated it might have impeded the success of his petitions.

The question seems to me to be simply what the parties understood to be intended. It is quite clear that 6,600 Rixdollars per annum were to be remitted at the time of the contract, for this sum was synonymous with the current interest. Does the contract express any intention of diminution? Not at all, but it carefully guards against increase by the words "only remuneration." Was there anything in the conduct of the defendant to deserve a retrenchment? None; on the contrary there was every thing to favour an increase, but for this express stipulation.

Upon the other parts of the case, there is, I apprehend, no difference of opinion between us.

The items of account on both sides seem to agree so nearly as scarcely to leave any thing for the officer to settle. But a claim is made by the defendant of five per cent. commission on the sums collected by him in discharge of the additional duties which, as I have said, he solicited to be employed. It is replied that his undertaking these duties was not only perfectly spontaneous on his part, but that from their nature, the discharge of them tended in a very great degree to faciliate his management of the principal undertaking, so as to make it an object of importance to him to obtain the permission he sought. He asked for no additional remuneration, nor was any promised to him; on the contrary, it was barred by the Minute, and whatever claim he might have upon the generosity of Government for recompense, he certainly has none in law.

It will be necessary in pursuance of the Charter to make a special entry of the Judgment in this case which must be that of the *Chief Justice* only, judgment subject, I am happy, to the right of appeal.

The Chief Justice and the Puisne Justice differing in their opinions upon this matter, the same has been adjourned for

upwards of seven days to wit, from the 29th day of January last past to this 29th day of April, when, the said justices continuing to differ in opinion, the question is decided by the opinion of the said Chief Justice, and such difference of opinion is hereby suggested on the Records of this Court. 1822. April, 29.

It is considered and adjudged, that the defendant was on the 31st day of March 1809, indebted to the Crown in the sum of Rds. 55,035. That the said debt was, in the year 1812, by the payment, on the February 1st 1812, of Rds. 5,074 and in July 1812 of 1,800, reduced to Rds. 31,960; that as the manager of the arrack farm of Colombo, he became indebted in December 1820, in a further sum of Rds. 10,393 makingthe sum of Rds. 42,354; that the defendant ought to be charged with interest upon his original debt of Rixdollars 55,035 down to 1812, and upon the balance of Rds. 31,960 to the date of bringing the present suit; that he is entitled to credit for a sum equal to the interest upon the whole of the original debt from the 29th May 1809, to the 31st December 1820, that he is not entitled to the commission claimed by him of five per cent. upon his collections, and that the officer do make up the account upon this footing.—(Per *The Supreme Court of Judicature*).

Raymond, vs. Vander Laan.

This suit is brought upon two bonds, originally passed by the defendants in July and August 1793, to the late Mr. Hendriksz, for the sum of Rds. 3,000 for which at the same time a garden and certain slave titles were hypothecated. The present plaintiff is the heir, and in making his demand gives credit to the defendant for payments to the amount of Rds. 1,250, since the death of the testator, reducing his claim to Rds. 1,750. Prescription against a hypothecary claim.

The defendant by his answer admits the bonds, but asserts generally that he has discharged them, and, in the loose way in which pleading has been permitted in this Court, he was allowed at the bar to insist upon a prescription in his favor from length of time, a bond being prescribed by 10 years of non-claim. By this the opposite party and the Court were, I must say, misled into a question which, upon the slightest consideration, will appear to have nothing to do with the case, and evidence was sought and a good deal of difficulty experienced in the attempt to take the claim out of the prescription, by proving payments within the legal period. But when the true nature of a prescription is considered with reference to

1822. April, 29. this kind of suit, it will be found, even had it been regularly pleaded, to be unavailable in this case.

The object of prescription. Prescription is intended as a protection to property, by an enactment that, after a certain time has elapsed without a claim having been made, it shall be supposed that the claim has been satisfied, although the evidence cannot be then produced which could have proved it, while memory of the transaction was fresh. It is not that a man forfeits his right by the lapse of time, but that as all human testimony and documents are subject to death and decay, that testimony and those documents which existed at an earlier period may in the course of years have been lost, and the defendant is protected against the chance incident to our nature by the law of prescription. But here the evidence is remaining and enduring, not only to shew that the debt did exist, but that it has not been discharged,—the hypothec in the hands of the plaintiff. In this there can be no mistake, and this is a case in which no prescription could avail, or indeed appear allowable, had not the law for giving security to property extended its protection even to such a case and permitted 30 years possession to extinguish an hypothecary claim.

This term has not run against this claim, and there must be a decree for the plaintiff with interests and costs.—(Per *The Supreme Court cf Judicature*).

May, 6.

Present:—Giffard, C. J. and Ottley, J.

May, 6.

Nagel, vs. de Quaker.

(3,900.)

In a case of breach of promise of marriage, the poverty of the defendant will be considered in the question of damages, so that he may not be left totally destitute, while

This is a suit (brought by the guardian of Harlay) to enforce a promise of marriage. Nothing can be more clearly proved than the contract. It is also clear that the defendant has treated the orphan pupil of the plaintiff with cruel levity, in solemnly engaging himself to her in the face of the public, and in a little more than four weeks violating his promise.

His best and indeed only defence is his poverty, which disables him, we are sorry to say, from making the reparation he ought to this unfortunate young woman. In awarding damages against him, we are only restrained by the consideration that he should not, whatever may have been his conduct, be left

totally destitute of means. But we shall go as far as we can in this instance, and make it his interest, in case the young woman should be satisfied still to accept him, to make atonement for his misconduct. 1822. May, 6. it shall be made his interest to atone for his misconduct by marriage, if still acceptable to the plaintiff.

The judgment of the Court is that the defendant do pay to the plaintiff, for the use of Justina Harlay, the sum of Rds. 300, with stay of execution (in order that he may have time to consider his conduct) of two months from the present date.—(Per *The Supreme Court of Judicature*).

Executors of Tolfrey, vs. Bennet.

(3,911.)

In this case, the Executors of the late Mr. Edward Tolfrey claim from the defendant the sum of 2,426 Sicca Rupees, being the amount of principal, interest and charges of a bill of exchange, drawn by him on the house of Coloins Bazell & Co., at Calcutta, dishonored for non-acceptance and non-payment, and taken up by the testator in whose favor it had been drawn. This bill which appears to have been drawn at the Cape of Good Hope, and to have passed through the hands of other indorsers, is admitted by the defendant to have been executed by him for the amount of 2,000 Sicca Rupees; the non-payment is also admitted. Action on a bill of exchange.

The answer of the defendant then proceeds to state, in that loose and irregular manner which is beginning to infect the pleadings of this Court, that value was not received for the whole amount of the original bill, 500 Rupees having been (to use that vague and scarcely grammatical language of the answer), "a gambling transaction," and then follows some absurd nonsense about a Court of Honor, of which no one has ever heard, and that the testator never called upon the defendant for interest. So far the pleading professing to be an answer goes to meet the demand of the plaintiff, but, as if to set all rule at defiance, there is embodied into this pleading an allegation that certain witnesses, living in distant and different parts of the globe, are capable of proving that the bet was made at the testator's house four days before the bill was drawn, that the plaintiffs gave some opinion about not demanding interest, and finally praying letters requisitional to examine two of the persons, who, as he alleges, were present when the bet was made, and a third of whose particular concern in the case no mention is suggested.

It is the necessary consequence of irregular pleading that

1822. May, 6.

the Court finds it difficult to shape its decision so as to appear fully to meet all the merits of the case, and in the present instance, when the matter of defence and the prayer for process and the solicitation of an unprecedented favor from the Court are so strangely mixed up together, it will probably not appear, so clearly as we could wish, that our decision is totally unconnected with any consideration of the extreme irregularity and impropriety of the pleading. The word "impropriety" is applied by the Court to the very ungenerous application of the term *tradesman* to the father of the lady who sues as one of the plaintiffs. Could the Court believe that the Proctor had been aware of the force of that contemptuous mode of expression, he should not escape, as he now does, our severest censure. But we must abridge our observations, for the case is a short one.

Validity of wagers according to English Law;

The bill is admitted but impeached as founded at least in part on a bet. We will suppose for a moment that the defendant was saved the necessity of proving this by the admission of the plaintiff. We do not know that a bet, as such, is illegal. If we look to the law of England, we know that it is not illegal,* in fact it is part of the law, unless it be on the event of a game by the statute of Anne which, in the pleadings, it does not appear to have been. By the Civil Law even, in the *Institutes*, a bet, depending upon a future event, is acknowledged as a binding obligation "*ut si aliquid factum fuerit vel non fuerit, veluti si Titius consul fuerit factus quinque aureas dare spondes,*" Inst. 3. 15. 4, and this is recognized in the Pandects, 45. 1. 115.

according to the Civil Law;

If then by the general Civil Law, a bet is not illegal, neither is it by the Dutch Roman Law. Van Leeuwen in his *Censurâ Forensis* says upon the subject of the general law, *Sponsiones nostratibus* Weddengen *quæ quatenus sub conditione casuali vel pendente a fortuna et dubio eventu factæ sunt, nullo jure prohibitæ censentur*, pt. 1. lib. 4. c. 14. § 11, and he quotes, in support of his assertion, the case in Sande, in which the Court determined in favour of a wager, to recover the amount of which an action had been brought. Van Leeuwen then goes on to state that by the laws of France, wagers, unless where a deposit was made, were void, but he adds *quod de moribus nostris affirmare non ausim.*

according to the Roman Dutch Law.

The same author, in his Dutch Roman Law, evidently

* But subsequently, 8 and 9 Vict. c. 109, s. 18, enacts that "all contracts on agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void," &c.—Ed.

confounds betting with gambling in general, and denies the right of the winner to recover the amount, and even shows, from some local statutes, that in some parts of the United Provinces, bonds, of which bets formed part of the consideration, would be void.

1822, May, 6.

To this it is to be answered that in the present instance, the action is brought on a bill of exchange *eo nomine*, and not for the amount of a bet, and with respect to the latter, that the local statutes referred to cannot control the proceedings of this Court.

But Voet, who is always clear and, as later in time, a better authority, gives the distinction justly, and it is that which the English statutes have adopted: *etsi enim circa ludos inquibus de virtute certamen est, sponsionem facere liceat; in aliis tamen, ubi pro virtute certamen non fit; non licet*, Ad. Pand. 11. 5. 8. and in another place, he is explicit as to the distinction, and the ground of it, *pericli pretium constitui ibidem permittitur si modo in aliæ speciem non cadat*, ib.

The drawer of a bill is liable to all expenses arising from its dishonor.

If then this defence, supposing it proved, could not avail, there is no ground laid for our preferring the very extraordinary course required of us, of sending to Europe and Africa, for the examination of witnesses. As to the interest charged upon this bill, one general principle is to be recollected "that the drawer is liable to all expenses occasioned by the dishonoring of the bill." These expenses, whether under the name of interest or exchange and costs of protest. ....[the rest of the judgment is wanting]

July, 6.

From The Provincial Court of Kalpentyn. } No. 2,364.

Rosayro, vs. Casie Chetty.

The following judgment of *The High Court of Appeal* in the above case, is found incorporated with the Minutes of the judgments of *The Supreme Court of Judicature* :—

Prescription.

There are many points offered for the consideration of the Court in this case, but that which is first to be considered (for on its decision will depend the necessity of going into others), is the plea of prescription offered by the appellant, Rosayro. He pleaded this in reply to a demand made upon him as executor to his father. The demand is of the maternal share

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due to the wife of the respondent Casie Chetty, as daughter of the testator's first wife who died in 1802.

The suit is brought in 1821, nineteen years after, and on the first view appears to be barred by the lapse of time. But it is replied that, on various grounds, the limitation should not apply in this case. These are, as I collect them, the three following:

(1.) That this is a case of a trust, against which, by the Equity of England, no limitation will occur. (2.) That the testator and his children must be considered as tenants in common of the property of his wife and their mother, and that his possession therefore could not be taken to be adverse to theirs, so as to support a title by prescription. (3.) That as the testator did not take out administration to his deceased wife until 1818, the respondent could not have brought his suit earlier.

Limitation against a trust.

That no limitation will run against a trust is a rule of English equity, against the justice or propriety of which it is impossible to state an objection; and though it is not specifically recognized in the Dutch Roman Law, I should feel very strongly inclined to support it where the case seemed to call for its operation. But how can this be called a trust? It is clear that there is no document by which it is so described, and I know of no construction of law, from which it can be inferred that the testator was a trustee. The property of the mother after her death was by the Dutch Roman Law vested in her children so far as their portion went, and not in him, and his possession of it could by no construction of law of which I am aware, be called that of a trustee.

Whether a surviving parent in possession of what was once the communal property, is a trustee for his children;

or a tenant in common with them?

And this is proved the more strongly when we came to consider the second objection, that the testator and his children must be considered as tenants in common of the property of the mother. There is no principle more firmly established in the Dutch Roman Law than that the death of either party totally extinguishes the *communio bonorum* between married people: *omnis societas* (says Sande) *morte alterius sociorum finitur nec ad haeredem socii transit etiam ex pacto*, lib. 2 tit. def. 9. "All partnership is concluded by the death of one partner, nor can it pass to the heir of the deceased even by agreement;" see also Van Leeuwen's *Dutch Roman Law*, 4 23 § 7, p. 413. If then the community of property expired with the mother, the possession of the testator was not the possession of the children, and this principle, brought by the way from the English law, and founded upon another principle of that law, which disables one tenant in common from suing another, cannot avail in the present case. I am not even prepared

to say that it would in any other, as the fundamental principle does not appear to be recognized by the Roman Dutch Law. 1822. July, 6.

But it is decisive of this point that the very kind of claim in question of the deceased, is by the Civil Law limited to five years after the right has accrued: that right accrued by the death of Martha: *at ultra quinquennium post aditionem numerandum separatio non postuletur.* Dig. 42. 6. 1. § 13.

Observations on *Joliffe vs. Pitt.*

The third objection is founded upon the alleged incapacity of the respondent to sue, as the testator did not take out letters of administration to Martha until 1818, and for illustration the case of *Joliffe and Pitt* and others in 2 Vernon 694 is cited. There both parties were absent from England when the debt was contracted; on the plaintiff's return to England in 1702, he commenced proceedings against the absent defendant which were regularly continued to 1706. The defendant died abroad in 1706, and his executor came to England in 1710 and proved his will, and in 1714 the plaintiff filed a bill in chancery against the executor and some other creditors who opposed his claim. It is quite clear that until the executor came to England, the plaintiff could not carry on his suit, because there was no one within the jurisdiction whom he could sue, but the case by no means supports the general position drawn from it; for had the executor been in England before he proved the will, he might have been sued, if it could be shown that he had intermeddled with the property of the deceased.

Where the surviving parent in possession did not take administration to the estate of his wife (who died in 1802) till 1818, *Held* that the claim of maternal inheritance by their daughter (who married in 1805) against the surviving parent was prescribed, because she was *valens agere* from the time of the accrual of such right; and that a general requisition by the surviving parent in 1818 to creditors to prove their claims, was not a waiver of prescription against such claim of maternal inheritance.

But the Civil Law gives the true rule by which prescription is governed, and it is perfectly consistent with what I have just stated. *In primis exigendum est ut sit facultas agendi*, Dig. 44. 3 § 1: it is necessary in the first place, that the plaintiff should have a power of bringing his action; and from this follows directly the rule of practice, *contra non valentem agere, non currit præscriptio*—" against him who is disabled from suing, prescription does not run."

To apply this rule here, let us see whether the respondent was disabled from suing for the maternal inheritance of his wife, from his marriage in 1805 to 1821.

Contra non valentem agere, non currit præscriptio.

It is very clear to me that he lay under no disability; he was in the language of the law *valens agere*; the property was in the hands of Simon de Rosayro, holding it certainly not in any privity of title with his children, at any period from 1802, when her right accrued, to 1805 when she married. The respondent's wife might have, if she found it necessary, demanded her maternal share; after that period her husband had the same full power; there was no absence of either party, no disability of either to commence or defend a suit. It was at

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all times in their power, if the form of the Dutch Roman Law were to be followed, to apply to have a curator appointed to the property of Martha; or if the newly introduced form of administration were looked to, they might have obtained it as creditors of that property; or if, what appears to have been the true legal condition of the parties, Simon was an adverse possessor of the property, they might have sued him without any further form, he was always forthcoming.

Prescription runs against a succession, though vacant, abandoned, and without a curator.

" The term of prescription " says Pothier," runs against a succession, though vacant, abandoned, and without a curator, for the creditors of such succession, who are persons having an interest in the preservation of the rights of succession, may procure the appointment of a curator : therefore they cannot avail themselves of the rule, *non contra valentem agere, non currit præscriptio.* Evan's Pothier *On Oblig.* p. 454, § 650.

It is indeed further urged in this case that Simon de Rosayro, in taking out administration in 1818, called upon persons having demands upon the estate, to make their claims, and that this waived the prescription. Had he specifically called upon the heirs to come in and take their maternal inheritance, it might have had this effect ; on the contrary, his account directly states him to have discharged their claims, and at all events, so vague an invitation cannot raise up a new right in the respondent, if it had been, as I conceive, utterly extinguished by prescription in 1807 or 1810.

The taking out of administration to Martha, seems to have created much of the difficulty of this case, and this difficulty shows how very cautiously a branch of a totally different system should be transferred to any code of laws. The Dutch Roman Law (notwithstanding what the Provincial Judge has been pleased to propound) knows nothing whatever of administrations, which are derived wholly from the English Code. How an administration to Simon could operate at all upon the rights of the respondent and his wife, vested absolutely by the death of Martha, I can in no wise conceive ; or why it should have been thought necessary by Simon to take it out—indeed the whole subject of these administrations in the subordinate Court is involved in a perplexity, which it would be a matter of public utility to have explained by competent authorities.

Thinking, as I do, that this suit is barred by prescription of five years, I do not think it necessary to go further, but I feel that by this opinion, the substantial justice of the case will be met. It is perfectly clear to me that the respondent supposed himself to have given up all demand to the maternal share by accepting the dowry, for he did so at a time when

the *Thesavalamai* was believed to be the law of Calpentyn— 1822. July, 6.
and by that law he would have been barred. A subsequent discovery that this code did not prevail there, and a subsequent quarrel which cut him off from the favour of his father-in-law, are in my mind, the real grounds of this suit, and the claim after having been utterly extinguished by the law of prescription, has been revived in consequence.—(Per *The High Court of Appeal*).

1823.

January, 13.

Present:—Giffard, C. J. and Ottley, J.

Pietersz, *vs.* *Carr*.

(No. 3,983.) 1823. Jany. 13.

Restitution of sale money, for breach of an implied warranty, when allowable, after eviction.

In this case the plaintiff sues for the price of some persons purchased by him from the defendant as slaves, the title to whom was afterwards evicted upon trial in this Court. It is not alleged that the defendant was aware of any defect in his title, or practised any fraud to mislead the plaintiff. This suit is brought against him on the general principle, that the vendor of any property conveys a direct warranty to the purchaser, even though it be not expressed.

Difference in this respect between the English and the Roman Dutch law.

There is certainly this remarkable difference between the Dutch Roman Law and that of England. By the English Law the principle of *caveat emptor* is enforced, the purchaser runs all risks, and unless the nature of the sale implies a warranty, the seller is not bound by any other than a warranty directly expressed. But at the same time that the Roman Dutch Law imposes this consequence upon the seller, it furnishes him the means of protection. The purchaser, if the property be claimed by any other person, is bound to give the seller notice, and under that notice, the seller may come in and put himself in the place of purchaser to defend the suit in the first instance, instead of leaving his interest to the negligent, or perhaps to the fraudulent, management of another. To enable him to do so, the law points out the mode and the time in which the purchaser must give him notice: it must

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be by a citation obtained on petition from the Court, during the pending of which the principal suit is suspended, and it must be before *litis contestatio*, in order that the seller may judge how he ought to plead. On these conditions only can the purchaser, if evicted, assert his claim of guarantee against the seller.

What I have just said as to the time and manner will appear from *Damhouder*, p 303 P. C. 131, and Van Alphen in the seventh chapter of the *Papegaij*, where the form of a petition is fully set forth. In the Placard Book, iii. p 790, in the Instructions to the Courts of Holland pp 115, 116, 117, 233 *et seq*. will be found the same, as we have just stated it.

In this case, the plaintiff insists that the defendant had all necessary notice. In this we cannot agree with him. The law points out a regular legal course, and by no other course can a plaintiff obtain the advantage of a guarantee. Nor can the plaintiff complain: if the law gives an advantage, it gives it only upon terms which must be complied with. The principle of guarantee is an advantage which the law of England does not give, and to obtain the advantage of that principle, the proper course must be pursued. In this particular case, it may be said that the land was not generally known to be as it really is. For this we know no remedy: it probably has become forgotten, from no case of guarantee having been brought before this Court.

Decree for defendant, without costs.—(Per *The Supreme Court of Judicature.*)

January, 24.

Present:—GIFFARD, C. J. AND OTTLEY, J.

Jany. 24.

King, vs. King.

1. Divorce cannot be granted on confession or consent;

2. nor where *condonatio* or *compensatio* has been pleaded and proved.

3. A wife by

This is a case brought by an husband against his wife, both British subjects, praying to be divorced from her on account of her adultery with a person named in the pleadings.

The parties had at first proceeded to plead according to the practice of the ordinary jurisdiction of this Court; but as we are bound by the Charter in the case of British subjects and Europeans to administer in substance the ecclesiastical law, as it is used and exercised in the diocese of London, we directed the proceedings to be framed, as nearly as possible, according to the practice of the Ecclesiastical Courts at home.

The cause, therefore, would have come before us upon the allegations and proofs made by the parties, had not a misconception of our directions induced the Proctors to file interrogatories in chief, which, by the way in which they have been constructed, have only served to obscure the case and enhance the expenses of the suit. As it is, however, the object of the parties, and the facts upon which they rely, are sufficiently apparent to the Court.

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eloping from her husband, disentitles herself to any claim of alimony.

The husband prays (the only remedy in the power of this Court to give) a divorce *a mensa et thoro*. The wife, retaliating the charge of adultery, also prays a divorce *a mensa et thoro*, but demands alimony.

It might be said that, as the parties agree in the prayer of divorce, the Court have no choice, and that the question of alimony alone remained for consideration. But in cases of divorce, the imperative rule of the Canon Law is, that no divorce shall be given on confession or consent; even the affidavit of either party as to any of the matters in issue is inadmissible. In all questions, says Sir John Nicholl, involving either the dissolution of marriage or separation *a mensa et thoro*, no credit whatever should be given to any statement upon oath, either of the wife or of the husband. *Best v. Best* 2 Phillimore, 166.

However, it is not in this case necessary to rely on admission or consent; the facts, as they arise in evidence, are sufficiently plain and conclusive.

There are two grounds upon which a charge of adultery may be so far opposed as to deprive the accuser of redress. The one is where the charge is retaliated, and the crime of the impugnant is compensated or balanced by proof of a similar offence in the promovent, and this is technically termed a *compensatio*. The other is where the offence has been made known to the accuser, and the matrimonial union has continued notwithstanding; in this case the aggrieved party is supposed to have remitted the crime and renounced all rights to complain, and this is called *condonatio*.

Carrying these distinctions in our mind, we find in the first instance, the charge made by the husband against his wife of adultery fully proved; the evidence of her daughter and her son, the evidence of Mr. Holoms and Doctor Collier prove the impugnant to have been the most abandoned and shameless adulteress, of whose guilt it is impossible to entertain a doubt. But, to deprive the promovent of any redress, she has proved that he also has committed the offence of adultery with a woman, with whom he cohabited before the arrival of the impugnant in this Island, and by whom he had

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two children. Much has been said in the bar in extenuation of his crime in the promovent: the climate and difference of sex are urged as excuses for the husband, which are supposed not to operate for the wife; but the law does not make any distinction between man and woman, or between one climate and another: the offence is the same, and the consequences to both the same.

But it is necessary to look at the *time* when this offence was committed by the promovent, not with a view of extenuating its enormity, but to show that it is remitted and extinguished in point of law, by the conduct of the impugnant herself. The crime was committed before her arrival, and it is plain that she was aware of it and its consequences. Indeed, the subject appears to have been grossly obtruded on her notice, by an eulogium upon the woman from the promovent himself. Yet after this, the impugnant continued to live with him, and by so doing, certainly gave him the plea of condonation with respect to all that had passed previously; and of any further adultery, after the impugnant's arrival, there is no evidence whatever.

Looking, therefore, on this ground of accusation as waived and annihilated by the impugnant herself, the plea of compensation, which is founded on it, is without a support, and must fall to the ground, so as to entitle the promovent to the separation he seeks *a mensa et thoro*.

The question of alimony is next to be considered. It is positively laid down in the books, that, if a wife elope from her husband, the law will not compel him to allow her alimony. *Ayliffe*, Pan. 58.

In this case the impugnant is proved not only to have eloped, but to have lived openly with her paramour until his death, and by such conduct we are of opinion that she has deprived herself of any claim for alimony.—(Per *The Supreme Court of Judicature*).

January, 27.

Present:—Giffard, C. J. and Ottley, J.

Jany. 27.

Rex, vs. Vanderstraaten.

1. An award founded upon a deed of grant, conditioned upon the

This is an information filed by the Advocate Fiscal (against the official administrator of the estate of Peter Vanderstraaten) for the purpose of recovering the possession of two parcels of land, one situate at Midipallatta and Ottepallatta

in the Province of Chilaw; the other, situated at Madampe in the same Province. The claim of the Crown, as set forth in the pleadings, is grounded upon a right of resumption, in consequence of the non-performance of the conditions upon which the property was granted. The information states that it was conditioned by the said grants that if the grantee, his heirs, executors, administrators and assigns should not within five years, well and truly bring the land into full and fair cultivation, according to the opinion of the majority of nine competent persons, to be assembled by the Collector for the purpose of inspecting the same, the said grants should be utterly void and of no effect. The information then avers that more than five years have elapsed, and that according to the opinion of nine persons assembled by the Collector as aforesaid, it appears that the above lands have not been brought into full and fair cultivation, according to the conditions upon which the said grants were made, and concludes with demanding that the grants may be declared null and void.

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grantee bringing the land within five years into "full and fair cultivation, according to the opinion of a majority of nine persons," to be appointed by the grantor, is illegal, as ousting the jurisdiction of the Sovereign's Courts of law.

In answer to this information, the defendant states that, of part of the land granted by Government, 120 acres have been brought to a complete state of cultivation, 280 acres properly cleared of jungle for the purpose of cultivation, 28 acres cleared and planted with cocoanut trees, and 464 acres remain uncultivated, and that no less a sum than Rds. 11,700 were expended by the grantee for the purpose of improving the land.

2. This agreement to refer to arbitration will not, therefore, preclude the matters in dispute from being reviewed on evidence, by the proper Court.

The replication is general, and merely insists upon the statements in the libel.

Upon these pleadings, the case came before the Court for hearing, and has been argued and supported by some kind of evidence on the part of the Crown; the defendant has not called any witnesses, and therefore leaves the case as made out on the evidence on the part of the plaintiff.

3. The words "*full* and *fair* cultivation," qualify each other, so that the grant may not be forfeited even though all the lands have not been cultivated.

It may be useful to lay down some general principles which may influence not only the present, but many similar cases which may arise upon the constructions of grants made by the Government of Ceylon. This is the more necessary, as we apprehend serious ill consequences may ensue, and much difficulty be experienced in attempting to enforce penalties for the non-performance of conditions, framed agreeably to those inserted in the present grant.

The particular clause to which we allude is that which commits the decision of the rights of the parties to the award of a majority of nine persons nominated by the Collector. It would be no easy task to devise a more exceptionable mode of proceeding than that which is prescribed by this clause. In the first place, let us consider the denomination of persons

1823. Jany. 27. who are to constitute this tribunal. The Collector is an officer chosen by the Governor and removable at his pleasure; the persons who are to enquire are to be selected by the same officer; no right of challenge is admitted; those persons are not upon oath, and the officer of the Crown is not limited to one or any number of inquisitions, but should it happen that five out of the persons selected by him in the first instance do not decide according to his dictates, he may proceed to hold as many inquisitions as he pleases, until he shall find five ready to comply with the wishes of Government. But the particular tribunal to which a resort is made is not the sole, nor the most formidable, objection to the grant under consideration. We cannot contemplate the introduction of such a mode of enforcing the rights of the Crown as consistent with those principles of equity, and that system of jurisprudence, which is best calculated to secure the interest of Government, and to administer justice to those who may be compelled to contest its claims. The proceeding, however, in this case is liable to an objection on this score quite fatal and decisive. The tribunal is wholly illegal, if it be erected to oust the Courts of their jurisdiction, and if not erected for that purpose, it is totally nugatory. The jurisdiction of this Court, and of all Courts acting under the authority of the Crown, is constituted for the purpose of deciding on its rights, and no device, no scheme, no subterfuge can be allowed to prevail, which is to evade the jurisdiction of the proper and constitutional tribunals, and draw the cognizance of legal questions from the King's Courts, and place it in other hands. Amongst the cases on this subject, it will not be necessary to mention above three or four.

The first is a case in 2 *Levinz's Reports*, K. B, p. 15, where, amongst the other matters to the same purpose and effect, it is stated that if a man by his will appoint that all differences between executors and legatees be referred to a certain person named and no other, yet this will not oust the parties of their right to sue in the King's Court. The next case is in 2 *Vesey, Junior*, p. 136.* In that case, the defendants pleaded, to the bill in equity for a discovery of a clause in articles of agreement, that in case of any variance or dispute touching the construction of any of the clauses, or any of their dealings under the said articles, or in consequence thereof, it should be referred to two arbitrators, (one to be chosen by each party), who were

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* *Mitchell v Harris.*—Ed.

to come to an arbitration, if necessary, the award to be made within a given time, and to be conclusive between the parties. The Lord Chancellor then puts the question to the counsel; "Have you found any case in which an agreement to refer has been set up as a bar to an action? There is not a suit to that purpose any where except where it was taken up at *nisi prius* in a case in Wilson." Acccordingly, the plea was over-ruled. In 8 *Term Reports*, 140* there is a subsequent case. The last case is quite decisive. The argument arose there on a plea similar to that in the last case, where parties had agreed to refer the matter to arbitrators. Lord Kenyon states it is unnecessary now to say how this evil ought to be determined, if it were *res integra*, it having been decided again and again that an agreement to refer all matters in difference to arbitration is not sufficient to oust the Courts of law or equity of their jurisdiction. And in 15 *Vesey, Junior*, p. 18,† Lord Elden, after having over-ruled a previous contrary decision as being against the concurrent opinions of Lord Hardwicke, Lord Thurlow, Lord Rosslyn and even Lord Kenyon, who had pronounced the erroneous opinion in one case, says "as a general proposition, it is true that an agreement to refer a dispute to arbitration will not force the parties even to submit to arbitration before they come into that Court."

And if an agreement so equitable as a reference to arbitrators, to be chosen by each of the contending parties, be not binding, we know of no principle, either of law or equity, which will sanction such a mode of proceeding as that adopted in the present case; but the case in *Levinz* is decisive on the point. Under these circumstances, we cannot consider ourselves as precluded from looking into the justice of the case and drawing such a conclusion as the facts appear to warrant.

The opinion of the nine persons selected appears, however, to have been given upon a fair and candid consideration of the subject, and no objection to the admissibility of their award, as evidence, has been made by the defendant; on the contrary, he appears to have taken the same view of the facts as the persons selected by the Collector, and as he has not objected to the proceedings, and as they do not appear to be inequitable, we are unwilling to make any objection on the part of the Court to their being admitted as evidence, although the proper proceeding would have been to show by evidence that the grants had not been complied with, and that a forfeiture had thence ensued.

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* *Thompson v. Charnock*.—Ed. † *Waters v. Taylor*.—Ed.

1823. Jany. 27. As to the land called Jackdissave, containing 729 acres 1 rood 21 square perches, the defendant admits that no attempt has been made to bring that into cultivation, and therefore we must declare that the grant is become void, and the plaintiff is entitled to recover, and this solely upon the defendant's admission.

With respect to the land, called Tellevally and Pambella, situate at Madampe and Pambella, the persons engaged to report upon its state of cultivation have represented that a considerable portion of it has been cultivated, that another part has been prepared for cultivation, that some portion, from the impediments to cultivation arising from the soil and other natural obstructions, could not well be cultivated, and a portion of 464 acres has been left uncultivated.

In deciding upon this case, we must now consider the intentions of the grantor and grantee, as they appear upon the grant, and a fair, liberal and equitable construction must be put upon the words so as to give effect to every part of the instrument. The real question is, has the land been brought into *full and fair cultivation*? The word "full" is not the only word used, but that word is coupled and restrained in its meaning by the word "fair." Has then such an use been made of the land, and have such exertions been employed upon it, as could reasonably be expected, under the circumstances in which the grant was received? Acting under the impressions arising from this view of the subject, we are of opinion that no such dereliction of the land as contemplated in the clause for resumption, has been proved; that the land is not forfeited, having been brought into full and fair cultivation according to the meaning of the contracting parties, and that therefore the defendant is entitled to retain possession.—(Per *The Supreme Court of Judicature*).

April, 28.

Present:—GIFFARD, C. J.

April, 28.

Executor of de Alvis, vs, Gerhard.

(3,940.)

1. The oral evidence of a witness (since deceased) in another suit,

This is an action to recover the value of a bill of exchange for Rds. 2,050, drawn on the 14th February 1817 by Mr. John Tranchell in favour of the plaintiff's testator, at two days' sight, and accepted by the defendant with interest at 12 per

cent. per annum from the 19th February, the day at which the bill is supposed to have been payable. I say supposed, for the date of presentation not appearing, we have no evidence of the time of its being actually due.

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though between the same parties, cannot be received, when the present matter in dispute did not then form the principal question in issue, but was only incidentally introduced.

2. The bare possession of an accepted bill gives to the holder such a *prima facie* title against the acceptor as may be rebutted (in failure of payment or express waiver) by a strong presumption of payment.

The answer of the defendant does not admit the authenticity of the bill, nor does it specifically impeach the bill; on the contrary, it relies upon the evidence of an account current that the bill was paid to the testator. On this a general replication is filed.

To support the defence thus pleaded, a file of proceedings in the Provincial Court between the same parties, but in an inverted relation is put in. Amongst these proceedings, the evidence given before the Provincial Court by one Cuylenberg, who is proved to have been dead and to have been the clerk of the testator, was offered to this Court. On the part of the present plaintiff, this was resisted, on the ground that the matter in contest in the Provincial Court related to a loan of arrack, and to nothing connected with the subject of the present suit. In answer, it was strongly urged that, by the very pleadings in the Provincial Court, it appeared that the account in question, as well as the bill now sued upon, were brought under consideration. But this, though perfectly true, does not satisfy the rule of law, that the matter in contest shall be the same: the incidental introduction of other matter will not constitute it the matter of the suit: this therefore cannot be received in evidence.

The account in Cuylenberg's handwriting, (he being proved to be the clerk usually employed by the testator), stands under different circumstances. But it is not signed by the testator, and its authority taken in the utmost extent, could be but slight, were it admitted in evidence.

The most important feature in the case seems to me the fact positively proved, that the drawer of the bill has never had any notice of its being dishonoured, and this brings me to the main point of the case. It is quite clear that the bare possession of an accepted bill gives to the holder such a *prima facie* title against the acceptor as will require strong circumstances to shake, indeed nothing but payment, or express waiver, will be an absolute discharge to the acceptor. But here he offers the presumption of payment, not denying his liability, but insisting upon its having been fulfilled; and he founds the presumption on the length of time which has been suffered to elapse before bringing the suit, and upon the fact of the drawer never having been called upon to discharge the bill.

As to the first, it appears that the bill was dated 14th

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February 1817, and payable after two days' sight, that the testator died in October 1817, and that the present suit was not commenced until 1822, nearly five years after. Nor can the executors say that they were ignorant of the testator's rights, since in the suit in the Provincial Court, their own pleading in October 1818 refers specifically to this bill of exchange, and though it certainly does not allege that it remained due, speaks of it as being in their possession. This length of time, this silence as to demand existing, and the very extraordinary fact of the drawer never having been apprised of any failure in payment, although the testator lived until October after the bill was made, certainly do furnish very strong presumptions to meet the naked fact of the bill remaining in the plaintiff's possession.

Under what circumstances, the judiciary oath may be administered to a party.

In this case, an English judge would have the benefit of that powerful assistance which a jury affords in the investigation of disputed facts. As a judge, I feel myself far from satisfied with any decision I could make, acting in the capacity of a juror in such a case. If I were to state the moral presumption which the state of the evidence leaves on my mind, I might offend against some of those strict and technical rules which the Civil Law inculcates on these points; and were I to apply those technical rules, I might feel that I was giving a decision against my own conscience. In such a case, I might have recourse to the aid offered me by the Civil Law: it empowers me to tender the judiciary oath to the defendant. If his oath shall satisfy the Court, its decision will follow of course. That the Court has such a power will not be questioned. One of the latest and best writers on the practice of the Dutch Roman Law, *Merula* (following older authorities) lays down very fully—*

Defendant examined swears that he discharged the amount; but his accounts are not very intelligible, it appearing that credit was given for these payments on February 17th, and they were entered, as made on the 10th and 13th March afterwards. This he cannot explain. Judgment for defendant. No costs.—(Per *The Supreme Court of Judicature*).

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* Neither is the passage from Merula quoted, nor the reference given, in the Minutes. Pothier, following the Civil Law, says that, to warrant the application of the *juramentum judiciale*, there must concur three things, viz. a *causa cognita*, *inopia probationum*, and *res dubia*, Obligations, Evans' Edition, p 575.—Ed.

July, 28.

Present :—GIFFARD, C. J.

Vanderspaar, *vs*. *Hansze*.

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The plaintiff sues the defendant, the late Master of the brig "Cornelia," for a balance of Rds. 3,119 on an account with the defendant. The account annexed to the libel charges the defendant, amongst other things, with value of certain goods shipped by the plaintiff on board his brig on her voyage to Calcutta and her return. No proof has been given by the plaintiff of the property which he charges against the defendant on the voyage to Calcutta. That part, therefore, must be dismissed, except so far as the defendant has allowed, in his statement of the account for coffee sold by him belonging to the plaintiff, Rds. 47. It is upon the return voyage that the plaintiff principally relies. He urges, and has even produced persons to swear it, that during a storm, which unquestionably took place, the defendant made a malicious selection of his property to cast it over board, for the alleged purpose of lightening the ship.

1. Jettison. A malicious selection of particular goods to be thrown overboard in a storm may justify damages being awarded.

2. Freight from place of wreck. Held on the contract that the master was not bound to convey goods further than the act of God and the dangers of the seas permitted him to do in his vessel.

That the master of a ship has a right, in case of danger, to sacrifice any of the property on board, for the safety of the ship and passengers, there is no question : it is a right recognized by the very oldest code of maritime law. But there is no doubt that the malicious direction even of rightful power against an individual, may become a justification to a Court to award damages for the injury.

In this case, however, it is utterly impossible to believe that any such malicious distinction could be adopted. The ship was full. By no act whatever could she be otherwise eased than by taking the part of the cargo which was uppermost, and accordingly even these witnesses are obliged to say that this course was pursued. One of these, indeed, says that the opposition of the merchants, owners of property on board, to the sacrifice of the goods, obliged the defendant to select those of the plaintiff. This, if true, though apparently impracticable, discharges him of the imputation of malice, for which there does not appear the slightest ground. But both these merchants and the plaintiff seem to have forgotten that such a selection would be absurd and useless, since they might be called upon to contribute.

General average.

1823. July, 28.

The next disputed point is the freight and expenses furnished by the defendant for the conveyance of the remaining goods, from the place where the vessel was condemned and the cargo landed, to the port originally intended. These expenses the plaintiff seems to think should be defrayed by the defendant. This opinion, however, cannot be supported. The defendant, in saving and getting ashore what he could, had done his duty: his ship was gone, and he was not bound by his contract to convey it further than the act of God and the dangers of the seas permitted him to do in that vessel. But if there were a doubt, the plaintiff's own letter directing the mode in which the remainder of the cargo was to be sent fully exonerates the defendant from any further charge.

Striking out the charges not proved, and taking those admitted by the defendant, I find that there remains against him a debt of Rds. 499, and that he is entitled to credit Rds. 84, leaving Rds. 415, for which the Court gives judgment.—(Per *The Supreme Court of Judicature*).

August, 13.

Present.—GIFFARD, C. J.

Rabinel, vs. Smyth.

Aug. 13.

(4,248)

1. In an alternative obligation, the choice belongs to the debtor.

2. Where a debtor had obliged himself alternatively to pay 667 Spanish dollars or 3,000 Rixdollars, within a year, but was in default, and in the meanwhile Spanish dollars had fallen in value.

In this case, the plaintiff sues upon a bond dated 18th September 1818, the condition of which is that the defendant should within twelve months pay her the sum of 667 Spanish dollars or 3,000 Rixdollars, Ceylon currency, which appears to have been the equivalent at the time of making the bond. It is admitted that this condition has been broken, but the defendant relies upon still having an option according to the terms of the bond, paying in either description of money. It is at the same time admitted that the value of Spanish dollars has since 1819, fallen considerably in value in so much that, I believe, the value in exchange is reduced one-third; and the defendant claims the right of paying in Spanish dollars at the depreciated value, in preference to paying that which was avowedly the equivalent at the time of making the bond.

Upon this claim some observations naturally force themselves upon us. First, that it never could have been in the

contemplation of the parties that the bond should be discharged by a payment of less value than what was lent, and in admitting it, the Court is called upon to sanction an act of glaring injustice. Had there been any hazard, any usurious advantage, any matter of contingent profit to one party, or any other involved in the transaction, then this fluctuating kind of discharge might have been accounted for, and with some reason. But there is none. What was confessedly worth 3,000 Rixdollars was lent to the defendant, and he now seeks to repay that loan by 2,000 of that currency. And I confess that, upon the first view of the case, the principle of law which gives the option to the debtor, in the case of an alternative obligation, seemed to warrant even this very hard case. But that principle does not reach this case. The breach, by not paying the bond within the year, appears to me to have deprived the defendant of any such option. Had Spanish dollars fallen in price before the 18th of September 1819, the claim might then have been made, and perhaps with effect. But now, in consequence of his own delay, the difference of value has arisen, and the question is, shall he be allowed to avail himself of his own wrong? But I think, the case quoted by His Majesty's Advocate Fiscal of *Cuming v. Monro*, 5. T. R. 87, is quite decisive as well as to the law as to the justice of this case.

1823. Aug. 13.

Held that the debtor forfeited his right of option, and became bound to repay the full equivalent of what was lent.

There a bond had been given for a penalty of £2,400, proclamation money of South Carolina. This, which was of value in 1774, was when the suit was brought of none whatever; but in 1792 when the defendant tendered payment in this proclamation money, the Court refused, as the defendant sought then to discharge his debt with what was become of no value, though had he paid it when it became due, it would have been an equivalent to his debt.

This case, as I have said, decides the point. Mr. Smyth, had he paid the bond when due, must have paid what was equivalent to Rds. 3,000. The plaintiff must be put in the situation she would have been, had she been paid as she ought to have been within twelve months. And I therefore pronounce judgment for the plaintiff in Rds. 3,000, the interest and costs.—(Per *The Supreme Court of Judicature.*)

1826.

January, 9.

Present:—GIFFARD, C. J. AND OTTLEY, J.

Arkadie, *vs.* *Mulder*.

1826. Jany. 9.

Board of Weiskamer, *Intervenient*.

A special hypothec, though posterior to a general one, is preferent to it.

This case was originally instituted by Peter Arcadie to recover from Dirk Mulder, as principal, and the executrix of Johannes Floen, as security, the sum of Rds. 800, and interest upon a bond dated 7th August 1822, together with a title deed deposited by way of collateral security, and a conveyance of the garden described in that deed. At the foot of the deed, there is also a confirmation by the wife of Mulder, of the whole transaction as far as the garden is included. On the prosecution of the suit, the plaintiff recovered judgment for a sum of Rds. 612 for which sum, together with the costs, execution was issued and returned by the Fiscal with the sum of £48: 7: 6.

On the 24th August a rule was made on the plaintiff to show cause why the sum levied by virtue of the execution should not be paid over to the Board of Weiskamer. Mr. Marshall argued in support of the rule, and stated that judgment had been obtained by the Weiskamer in 1819, upon a bond and special hypothec and a general hypothec attaching to all the property; that the property specially hypothecated had been sold, the proceeds exhausted and the balance left unpaid in favour of the Weiskamer; and he urged some points as indicative of fraud in the transaction.

Fraud must be proved.

Whatever ground there might have been to suspect the existence of fraud in this case, no evidence has been adduced which would authorize us to decide the case upon that point. The case is therefore left open for decision upon the simple point of law, which has been urged on behalf of the Weiskamer. We are called upon to decide whether the general hypothec, which existed in favour of the Weiskamer, shall prevail over the special hypothec in favour of the plaintiff, Arkadie, so as to give the Weiskamer a priority of payment out of the proceeds of the sale of the garden included in Arkadie's mortgage.

This is not a new case, and we have the benefit of two considerable authorities, to guide our decision. In *Lybrechts*,

36. § 14, we find it laid down that a special hypothec takes precedence before a general hypothec, although prior in order of time, and although passed before the same Court. In Grotius, *Inleiding*, ii. ch. 48, we find the same doctrine in nearly the same words: "special puisne (sic) mortgage of immovable property, duly executed, has greater force than a prior general, although passed before the same Court." 1826. Jany. 9.

Mr. Marshall has adduced the authority of *Domat* in his favour, an authority of great weight and highly deserving of of every consideration, when speaking of general principles,* and the application of those principles to the laws of France, but the laws of France are not the laws of Ceylon. The decision of the Dutch Courts must regulate our conduct, and the authorities above quoted are too decisive and direct upon that point to admit of doubt. The policy of the French law of registration, likewise materially affected cases of hypothecation of immovable property. By the laws of that kingdom, commencing as early as the sixteenth century, so strict were the laws of registration, that a purchaser with full notice of the execution of a prior unregistered deed, was still entitled to priority. A general hypothec in France, therefore, which was registered, would give notice to all the world of the existence of the incumbrance which it created, and no injury could arise to third persons ; but if a general hypothec were allowed to prevail over the mortgage of specific property, under our laws, the greatest injury might ensue. We decide, therefore, that the money arising from the proceeds of the writ of execution be delivered to the plaintiff, Arkadie.—(Per *The Supreme Court of Judicature.*)

Observations on the authority of *Domat.*

January, 23.

Present :—Giffard, C. J. and Ottley, J.

Jany. 23.

Staples, *vs.* *Boyd*, *et al.*

This is a suit brought in the nature of an action for money had and received by the defendants, representing Mr. W. Boyd, for the use of the plaintiff. The cause of action is the payment

Where it was proved that, according to the custom or

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* From Mr. Herbert's translation (published in 1845) of Groenewegen's notes on the passage cited here from Grotius (sec. 33), we find the Roman Dutch Law different from the Roman Law on this point. Hence the inapplicability of Domat, who is an exponent of the Roman Law.—Ed.

1826. Jany. 23.

merchants in Ceylon, agents were entitled to a commission of five per cent on the amount of judgments recovered by them for their principals *etc.* *Held* that this was a bad custom *etc.*

by mistake of a certain sum of money received by the defendants as commission upon the amount of a judgment recovered by them, as attornies of the house of Hebdeen & Co., for the sum of £1,216 against the now plaintiff.

This sum of commission being in the former currency of Ceylon Rds. 877, the plaintiff alleges the defendants to have wrongfully deducted, out of money of his in their hands, contrary to the tenor of the agreement between him and Hebdeen & Co. by which, on the actual payment of £600 in London and the promises of a further payment in Ceylon of £300, this sum of £900 was to be taken in lieu of the £1,216 awarded by the judgment, which sum the plaintiff contends was, with the law charges, all he was required by this compromise to pay.

The sum of £300 appears to have been duly paid in Ceylon, together with the law charges, this bill of costs amounting to Rds. 68; and on this ground the plaintiff contends that the defendants, having detained the charge of commission, have done so in his wrong, and should refund the amount.

On the other side, it is contended by the defendants, that by the custom of merchants in Ceylon, Agents are entitled to a commission of 5 per cent. on the amount of judgments recovered by them for their principals, and of two and a half per cent. for money sued for, when no judgment follows; that in this case, they had actually earned the commission on £1,216, by carrying the cause to judgment and getting security for the amount, and that this sum they had a right to retain out of the first proceeds which came to their hands; that their principal could not by any act of his deprive them of this right, and that in fact by the compromise he had not intended to do so.

With respect to the custom of merchants in Ceylon, we allow that very respectable witnesses have proved that 5 per cent. upon judgments recovered, is considered as the lawful charge; but we are far from holding ourselves bound by this statement, when we consider the nature of an agent's duty, and the consequences to which such a rule would lead. The duty of any agent in such a case, acting for a merchant in England, is to do for his principal as he would have done for himself if in Ceylon, and having attained the fruit of the judgment, the further duty of an agent is, to remit the amount to the principal in England. It is clear that the great labour and responsibility of an agent in such a case is to collect the money and to transmit it, at the usual hazard of all remittances, to his principal in England. But in Ceylon, employing and instructing the professional persons as to the case, and receiving

the money when levied is the whole of their duty. We will suppose a case where a judgment for £10,000 is awarded, and an execution issues, and no goods are forthcoming. Is it to be supposed that for only employing and instructing a Proctor, they would be entitled to make a charge against their principal of £500. It is because such a monstrous conclusion might ensue, that we are obliged to reject the authority of such a rule. Even upon the money actually recovered and received by the principal, the rate of commission appears so high that, without some proof of an acquiescence or approbation of such a charge, it would be difficult for a Court of justice to authorize it. Nothing can be more striking than the disproportion of this charge to the sum actually disbursed. Upon the sum of £900 which appears to have been available to Hebdeen & Co., the law charges for recovering that sum are Rds. 68, and of this at least one-third goes in duties to Government, so that the painful labour of the Proctor is sufficiently renumerated by about Rds. 45, while the agents make a charge of Rds. 877. 1826. Jany. 23.

The true question in this case is, what was intended by the compromise, by whom was the commission due to Boyd & Co.—for some was certainly due to be paid according to the spirit of that agreement.

We have given the matter full consideration, and recollecting the first expression in Hebdeen & Co.'s letter, that the sum to be paid was to be clear of all lawful expenses, we can easily believe, by the expression "law charges" in the second letter, that such included charges induced by the necessity of resorting to a suit at law, and of course included that of commission payable to the agents who commenced and carried it on, and in this opinion we are as well fortified by the doubts of the plaintiff himself on the subject, as by the positive refusal of the partner Deacon to give the compromise any other construction. It is thus clear to us that whatever commission was due to the defendants was payable by the plaintiff.

We are next to consider upon what sum the defendants were justified in detaining the commission. Upon the view of an Agent's duty which we have taken, it is quite clear that on the sum of £300, actually received by them and remitted to their principal, they are so entitled.

It is clear that, with respect to the £600, they were ready to receive it and remit it from Ceylon, but that by the joint act of Hebdeen & Co., and the plaintiff in England they were saved that labour. The question is whether the act of Hebdeen & Co., could deprive them of that amount. We think it could not. That house has had the advantage of their labour to that amount. The £600 has been recovered by their industry,

1826. Jany. 23.

and the house of Hebdeen & Co., was in the first instance bound to pay them; by the compromise that burden was taken on himself by the plaintiff, and he is in our opinion liable to the charge. The balance stated by the compromise amounting to £316, stands differently circumstanced. It never produced any advantage to Hebdeen & Co., and must therefore fall under the kind of cases to which we have alluded—of a judgment recovered which produced nothing to the plaintiff in consequence of the defendant's insolvency. But it differs in this last particular: it was not the insolvency of the party against whom the judgment was had, which deprived Hebdeen & Co., of the fruit so far as £316; the agents had actually fixed and secured that amount by their diligence in taking sufficient securities for it, and there is no reason to doubt they would have completed their task by recovering and remitting it to Hebdeen & Co. In doing so, they were interrupted by the act of Hebdeen & Co., and as nothing done by him would divest them of the right to what they had earned, we think the defendants entitled to commission on this sum.

By whom then was this commission to be paid? This we have answered in our general view of the evidence by the present plaintiff.

As to the amount or rate of commission, we give no opinon as to such an amount generally, but in this instance we fix upon what appears to have been intended by all the parties as the rate. No objection was ever made in this particular. To that rate we consider the plaintiff is bound. The plaintiff's libel must be dismissed with costs.—(Per *The Supreme Court of Judicature*).

Beaufort, et al. vs. Forbes et al.

Schultze, Intervenient.

(4,551,)

1. Schultze bought a vessel from Kilwick, who collusively transferred it to King, whereupon S. obtained judgment awarding damages

In this case, the action was brought by the attornies of Scott & Co., against the original defendants for seizing, under an execution issued out of this Court on a judgment at the suit of Schultze against Kilwick and King, a vessel, named "the Sophia" which the plaintiffs claimed as their property at the time of the seizure.

Many arguments have been adduced to show that the conduct of the defendants was illegal. But they may all be

resolved into this : that the defendants seized a vessel to which the plaintiffs had a title, either by possession or by a regular conveyance.

1826. Jany. 23.

against both the defrauders, and seized under his writ the vessel, as the property of King; but King had, before judgment, sold it (without giving over possession), to Scott & Co. *Held* that Scott & Co.'s claim to the vessel seized was ineffectual, *etc.*

The circumstances of the case are these. The intervenient Schultze brought an action against Kilwick and King to recover compensation in damages for the injury he had sustained by depriving him of a vessel which he had purchased. No legal title had been made out in favour of Schultze, but by a fraud committed through the instrumentality of the two defendants in the former action, the legal title had been conveyed to King, and possession delivered over to him. Schultze, having recovered judgment to the amount of Rds. 3,926, caused an execution to be issued, and the vessel was seized under the execution as the property of King the defendant. It appears, however, from the evidence in the present case, that after the commencement of the former action, and before judgment, the defendant, King, had conveyed the vessel to the plaintiffs, Scott & Co. Under that conveyance, as well as the bare possession, the plaintiffs endeavour to support their claims. But on looking at the instrument of sale, we find it to be inoperative, for want of a stamp. Then, as to the actual possession of the vessel, it appears to have remained with King. He gave orders for the management of the vessel, and as far as appears by the evidence, except the very slight testimony of Mr. Daniel, the superintendence continued to be exercised by him. The plaintiffs, however, allege that King was their agent, and that he had given notice of this circumstance, by an entry at the Custom House of Trincomalie.

2. Bare possession affords such evidence of ownership as will avail against all persons, except those who can have a legal title to the property.

The fact of bare possession does undoubtedly afford such evidence of ownership as will avail againsts all persons, except those who can have a legal title to the property, but as against them the bare possession can afford no protection.

Allowing that the plaintiffs were at any time in possession of the vessel, a fact of which the proof is neither clear nor satisfactory, we are led in the next place to enquire whether they had any such possession as would protect them against the process of the Court under the judgment against King.

The property in the vessel had become vested in King. He had acted as owner for a considerable time, and was clothed with the necessary documents to prove his property. Under such circumstances, the vessel was clearly liable to the execution, unless King had done some act by which he had become divested of the property. Has he executed any legal instrument disposing of the property to the plaintiffs ? The only conveyance under which they claim is invalid, and we are, therefore, of opinion that the vessel was liable to this execution,

1826. Jany. 23.

and that defendants are not guilty of wrongful trespass laid to their charge. Plaintiff's libel must be dismissed with costs.—(Per *The Supreme Court of Judicature*).

July, 24.

Present:—Giffard, C. J. and Ottley, J.

Holland, vs. Winter.

July, 24.

(4,767,)

The acceptor of a foreign bill of exchange is liable to pay according to the course of exchange at the time of acceptance.

This is an action brought by the plaintiff to recover the sum of £2. 18. 2½, being the balance claimed by him on a bill of exchange for £97 sterling, drawn by Mr. Winter, on Messrs. Musket and Young, and accepted by the defendant for himself and company, on behalf of the late firm of Messrs. Musket and Young.

The immediate object of the controversy in this suit is trifling, but the question, which the Court is called upon to decide, is one of great importance to the mercantile interest in Ceylon. The discussion arises out of the arrangements lately made by the British Government for the introduction of the English coin, and the premium demanded on the sale of bills of exchange.

The plaintiff relies on what he denominates the "exchange," which is considered to be three per cent. against this country, being the price charged by Government for remittances. The defendant relies on the Regulation No. 8 of 1825, which was published at the time, when the new coinage and the new standard of the value of money were introduced. By the plaintiff, it is contended that the bill drawn cannot be satisfied, except by a sum which would in England place him in the situation of receiving £77 sterling.

By the defendant it is contended that the Regulation, having fixed the value of the colonial currency and declared that British silver coin shall be a legal and full tender in every matter of account throughout this Island, and that the Rixdollar shall be taken at the relative value to British currency 1*s*. 6*d*, he has fully discharged his obligation by the payment of £97 according to that standard.

This being a question principally of mercantile consideration, the plaintiff has called three of the most respectable

merchants as witnesses, who were supposed to be well informed in such matters. Their opinions are decidedly in favour of his right to receive not only the sum of £97, colonial currency, but the premium demanded by Government on the sale of bills, for witnesses have proved that no good bills can be purchased at a smaller premium than that demanded by the Government. 1826. July, 24.

The plaintiff having satisfactorily established these points, and the defendant having been called on to enter into his case, the Proctor for the defendant admitted that his client, as acceptor, was undoubtedly bound to pay the exchange, whatever that might be, at the time when the bill became due; but that he was not obliged by law to make good the re-exchange, or the expenses necessary for remitting the money back to England. The law is so clear on the last point, that all arguments in support of his position are superfluous; but we cannot admit that this is a case of re-exchange.

The main question then for the consideration of the Court is the following: was there, when this bill became due, any course of exchange between Ceylon and England? If there were any course of exchange, what was that course?

'Course of exchange' defined.

The course of exchange was the current price of money in one place compared with the price of money in another place. If £100 in England, or a bill for that sum payable in England, will entitle me to £103 in Ceylon, then the exchange is said to be £3 per cent. against Ceylon. If, on the contrary, £100 in England or a bill for that sum can be procured in Ceylon for £97, then the exchange is said to be £3 per cent. in favour of Ceylon. The course of exchange is acted upon by so many causes, that it is seldom stationary for any considerable length of time, and in India it has fluctuated to a vast extent. In Ceylon, where paper was the only currency for the Island, the exchange, which at par would have been 11¼ rixdollars in a pound sterling, has sometimes, I understand, risen so high as 19, or the exchange was 8¼ rixdollars in a pound sterling against Ceylon. In 1825, at the time when the Regulation was published, the pound sterling was, I believe, worth about 15 rixdollars, and the exchange was 4 4/7 rixdollars the pound sterling against Ceylon, or £31. 5. per cent. against Ceylon. The sum of exchange, or the relative value of money in Ceylon and England is Rds. 13. 4 the pound sterling, or if we take the English coin, which is also part of the legal currency, twenty shillings here are exactly worth £1 when the exchange is at par. But can we procure £1 in England for twenty shillings here? The testimony of the merchants proves that we cannot. What then must we

1826. July, 24. — pay in Ceylon for one pound in England? We must pay 3 per cent. or 3/5 of a shilling at a premium for a pound in England. This is the course of exchange between the two countries.

Therefore the judgment of the Court is that the plaintiff do recover the sum of £2. 18. 2½. Under the peculiar circumstances of the case, we do not think that either party ought to have costs.—(Per *The Supreme Court of Judicature*).

Dec.—

* * * *

A person attending on summons before a Magistrate or J. P. is privileged from arrest *eundo, morando et redeundo*.

Under what circumstances, the Roman Dutch Law may be superseded.

*** the Charter of 1801. It has been always understood, and this Court has always acted on the understanding that the basis of law in this Island is the Dutch Roman Law, as administered at the period of the conquest in 1796, "with such deviations, expedients and useful alterations" as, in the words of the Charter, "shall be either ***absolutely necessary*** and ***unavoidable***, or evidently ***beneficial*** and desirable."

Such deviations expedients and useful alterations have been introduced in a variety of ways, some by regulations of Government, some by this Charter itself, and the two latter Charters. Some have become absolutely necessary and unavoidable, and others have been so evidently beneficial and desirable as to have been adopted as a matter of course.

Of those which have been affected by Regulations, it is not necessary to speak. Of the total change in the course and practice of pleading both civil and criminal cases, the Charter itself is the foundation and directory. The introduction of trial by jury in the Charter of 1810 was necessarily followed in practice by the adoption of the only law of evidence which could consist with that mode of trial, the English Law, and thus, the whole cumbrous code of proofs, full, half and quarter probabilities and presumptions, framed by the metaphysical doctors in the closets, was of necessity swept away,

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* The great imperfection of the Minutes of this year prevents me from stating, with certainty, in whose matter, or on what day, this elaborate judgment was given. But the facts of it are so precisely similar to those involved in the judgment that follows the present one, that it is not difficult to say that both the judgments refer to the same matter, and contain in each the individual opinion and line of argument of each of the judges.

If then I may take it for granted that the present judgment was "*in re* the application of Siva Poonian for a writ of *habeas corpus*," its date may be fixed approximately in the month of December, 1826, inasmuch as Siva Poonian appears to have been arrested on the 25th of November.

The first part of the present judgment, it will be perceived, is lost.—Ed.

and finally, and not the least beneficial or desirable deviation was a constant reference to English authorities for the practical application and explanation of legal principles common to both laws.

1826. Dec.—

Applicability of the law of contract, English or Roman Dutch, to personal as well as real property, in Ceylon.

In doing this, the Court has found little difficulty. The laws of contract,—except in a few unimportant points, such as warranty, *communio bonorum, s. c. Velleianum* &c, and these have been always reverently observed,—are the same in principle in both the English and Dutch Law, and as all property in the country fall under one description, nearly the same law of contract or possession applies equally to a bale of goods or to property in land, so that we can safely adapt all our decisions, as well with respect to landed property as what in England would be called chattels, to the same law of contract, and thus avail ourselves of the latest English decisions on this law, instead of resorting to the conflicting opinions of doctors who in the repose of their closets never can be supposed to elucidate legal principles with the same success as must attend the vivid discussion of an enlightened bar, and the sound learning and calm investigation of judges, reasoning in public and whose high character are a stake for the purity of their decisions.

For testamentary law, the Charter has made ample provision and given such precise direction as to the law to be observed, respecting every class, as no Court can mistake.

The only great branch of jurisprudence remaining is the criminal law, and in this, as I have observed, the Charters have enacted such extreme deviations from the Dutch Roman Law, that, excepting a few technical phrases, scarcely any of this law remains. The laws supplying its place is that set forth in the Charter of 1801. The manner of pleading and the whole course of proceeding are so accurately fixed as to render mistakes nearly impossible. The Charter of 1810 is equally precise as to its object. The establishment of trial by jury, and the introduction of the English Law of evidence has been admitted on all hands to have been absolutely necessary.

Having thus, I apprehend, vindicated the Court from the imputation which has been thus hazarded, I shall proceed to the particular case before us. The prisoner is brought up by *habeas corpus*, and I am happy to find that the power of issuing that writ is no longer denied. Had it not been vested in this Court, the King's subjects in Ceylon would have been without a shadow of remedy against any oppression which might be exercised. It is by the general spirit of clause 82 of the Charter of 1801, that this power was asserted and

1826. Dec.—

exercised. By that Charter, the Court is empowered to exercise a general superintendence and control in all matters of criminal jurisdiction, and it is obvious that, without the power of issuing this writ, every attempt to exercise this superintendence and control would have been utterly vain and powerless.

To the writ of *habeas corpus* it is returned that the prisoner has been arrested on a warrant in a civil suit issued from the Provincial Court of Colombo, and we are told that we are so far concluded by the return that, as we cannot look into the validity of the proceedings in that Court, we can enquire no further. This is however so utterly contrary to the practice of the Courts from which we derive this writ, (and it will not be questioned that in deciding upon the manner of such a proceeding, we may look to the practice of the Court from which it has been adopted), it is so contrary, I say, to their practice that it is not necessary to say more than that, in all things not inconsistent with the facts stated in the return, the Court may receive such explanation as may serve to show that it ought to interfere, even admitting the truth of that return.

So, in this case, the return is admitted to be true: the prisoner has been arrested by the authority alleged, and the right of that authority to issue the writ is neither examined nor questioned. But the prisoner offers proof that he was attending a public duty as a party in the Sitting Magistrate's Court, and urges that the writ ought not to have been executed on him, whilst so attending. Subsequent affidavits have been filed to show that he delayed without necessity, and cannot avail himself of this suggestion. Upon this part of the case we are of opinion, that no unnecessary delay has been proved, and that, if protected in attending the Court in the way stated, he is also to be protected liberally *eundo et redeundo*. Taking it then that he was so in attendance, the question is, whether the arrest under such circumstances was legal, and whether, if legal, this Court can interfere.

The latter point must necessarily be first decided, for if we have no right to interfere, there is no use in our discussing the regularity of the arrest. It is said that only the Court whose process is alleged to have been abused, or the Court in which he was attending, can interfere. And it is further stated that the Provincial Court has been applied to, and declined, to discharge the prisoner and that this Court therefore should not act. To this I reply, that a refusal of this sort by one Court does not preclude another from acting, if it has the power otherwise. In one great case in Ireland, *Rex vs.*

In a plea to jurisdiction, where it is to a Court of general jurisdiction, it must be shewn not merely where

Johnson, † the three Common law Courts and the Chancery were successively applied to, and no such doubt was suggested. With respect to the Sitting Magistrate's Court, it does not appear to have been resorted to, but if it had, that would, I imagine, have been totally helpless. A Justice of the Peace (and the Sitting Magistrate is no more) has no authority to issue a *habeas corpus*, and to punish for the contempt: even if he could have done it, it would not protect the witness in his attendance. In this Court, however, I think a resource may be found. By that very comprehensive clause, to which I have already alluded, the 82nd of the Charter of 1801, this Court has confided to it a *general superintendence* and *control* over all Justices of the Peace &c., to "*preserve* them in the *performance*, and within the limits, of lawful authority." Now it appears to me that nothing can tend more immediately *to preserve* a Justice of the Peace *in the performance of his lawful authority* than protecting those whose attendance he may require in the execution of that authority. It must be recollected that the subject is bound to attend on the requisition of the Magistrates, and that if he be not protected in that attendance, he must either disobey, to the manifest detriment and contempt of public justice, or if he does obey, may fall into the hazard of an arrest, which he otherwise might have avoided: a situation of hardship to which no man should be subjected.

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the jurisdiction vests, but also negatively that it is not *there*.*

Arrest for debt is (if I may say so) not encouraged by the law; it is rather an exercise of private, than a vindication of public, justice, and is therefore not so rigorously aided and enforced as arrest in criminal matters. Hence arise the numerous privileges and exemptions to be found in the law books, some of them are even recognized in our regulations, and which would be totally incompatible with an unbending tendency of the law in favour of imprisonment in civil suits. So in England, there are privileged places and privileged persons not to be invaded by civil process, yet liable to the execution of warrants in criminal matters; and hence the variety of cases which have been cited, in many of which the result has been to leave the defendant, and in some instances the possession of the privileged place, to a civil action for

Arrest for debt not favoured by law.

† Reported in 6 East 583.—Ed.

* Per Lord Ellenborough, C. J. in the case cited, *ib* p. 601. The rule for jurisdiction is that nothing shall be intended *to be out of* the jurisdiction of a *superior* Court, but that which is expressly alleged and shewn to be so; and on the contrary, nothing shall be intended *to be within* the jurisdiction of an *inferior* Court but that which is so expressly alleged, *Peacock vs. Bell*, 1. Saund. 74 d. (sixth edition.)—Ed.

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the trespass, while the arrest continued valid. And an attention to these very circumstances will lead us to the principle of law, on which the Courts have acted. Where the privilege was merely a private and personal right, either in the owner of a franchise, or in the person enjoying it, then the process of law was valid, and the private right left to be vindicated by a claim of damages; but when the privilege was on behalf of the public, as in the case of a witness whose service and attendance public justice required, then the person obeying the command of the law, is protected during that obedience; and it is upon this ground that we can see how inapplicable is the exception, cited from the Civil Law writers, of a person *suspectus fugae*. All the privileges stated by these writers, and to which such a case forms an exception, are *personal* and not public privileges—attendance on fairs, in churches, etc. But the principle of protecting witnesses attending a Court seems to have been too obvious as a matter of natural justice to require recital.

It is upon the whole our opinion that we are bound to preserve the Sitting Magistrate in the performance of his lawful authority, by giving protection to those whose attendance he may require for that purpose, and that the prisoner be discharged from this arrest, irregularly executed on him, while so attending.

In the matter of the application of Siva Poonian, *for a writ of* habeas corpus.

A person attending on summons before a Magistrate is privileged from arrest *eundo, morando et redeundo.*

In this case, Siva Poonian sued out a writ of *habeas corpus* for the purpose of being discharged from imprisonment, upon the ground of the arrest upon which he was taken having been illegally made. In his petition to the Court, supported by his affidavit and that of Mr. Jumeaux, he states the circumstances of illegality under which this caption was effected. They are as follows :—" That the said Siva Poonian instituted a prosecution against one Tamby Marikar, and the 25th day of November was appointed for hearing his case, that he attended in obedience to that appointment, that his case was not heard, but further postponed by the Magistrate until a future day, and that soon after he had left the Court, he was arrested by a peon of the Fiscal ; that the Deputy Fiscal made a return to the Provincial Court, out of which the warrant of arrest had issued in the following words :—The within named prisoner is sent herewith before the Court."

At first sight this transaction appears to be wholly at

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variance with that principle of law, founded upon public policy, which protects every man engaged in the prosecution of a suit, whether criminal or civil, who, at the time of the arrest, is acting in obedience to an order of the Court in which the prosecution was instituted or engaged in attending the Court in the process of the suit.

Had the case come forward in a Court simply on the principles of English Law * * * ingress and egress from the Court, the season of his refreshment and the supply of his natural wants: and the protection is afforded, not only to the opulent and unembarassed, but to all, however overwhelmed with debt and pecuniary incumbrances, against whom no criminal accusation has been honestly and fairly adduced. The English Law, however, upon this subject is so generally understood and so universally admitted, that all reference to cases would be superfluous and tedious.

But the right to discharge, which this petitioner claims, has been opposed upon several grounds.

First, it has been contended that this Court cannot examine the validity of the civil proceedings of the Provincial Court.

Secondly, that we are concluded by the return to the writ and cannot examine any further.

Whenever the proceedings of one Court are incidentally brought before another, it will be competent for the latter, though having no appellate jurisdiction over the former, to examine into the regularity of such proceedings.

As to the first proposition, namely that this Court cannot examine the validity of the civil proceedings of the Provincial Court, were it necessary to argue that point, I should be prepared to show that we not only have, but must have a power of examining into those proceedings, whenever they come incidentally before us. Thus the Court of King's Bench certainly has no appellate jurisdiction over the Courts in the West India Colonies, yet when an action is brought in that Court upon a judgment obtained in those colonies, it always examines into its regularity, *Buchanan vs. Rucker*, 1. Campbell 63.† And it by no means is a consequence that we cannot examine cases which are incidentally before us * * * the trial of the execution of deeds does not apply to their original jurisdiction. I am not at all satisfied therefore that we are concluded from examining the regularity of the proceedings of the Provincial Court. But the matter in question does not

* These asterisks indicate the passages lost, from the bottom of the pages in the Minutes having worn away. No more than two lines in each page of the MS. could have been so lost.—Ed.

† The point decided in this case is this:—no action will lie upon a foreign judgment, on the face of which appears a practice that is opposed to reason and justice, although such judgment may have been according to the usual course of practise of that Court.—Ed.

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rest upon that ground. We do not in this case look into the regularity of its proceedings: we take for granted that all the proceedings are regular.

Let us now consider the second question, viz. whether we be bound to look no further than the return of the writ by the Fiscal.

Were this argument to prevail, it would prevent the discharge of every person illegally apprehended under a legal warrant: for the sheriff would naturally return upon a capias for instance, *cepi corpus*, without going into the detail of any of the particulars under which the arrest was made; the prisoner therefore could never obtain his release, for an effectual bar would be opposed to enquiry.

Courts will not, upon *habeas corpus* enter into an investigation of the truth of the facts alleged by the Sheriff in his return to the writ, but other facts consistent with such return may be stated.

It is certainly laid down that the Courts will not upon *habeas-corpus* enter into an investigation of the truth of the facts alleged by the sheriff in his return to the writ: but I never heard of an objection being made to the statement of other facts which are consistent with the return of the sheriff, nor do I recollect any dictum to the contrary, and justice absolutely requires the admission of such statement.

Taking it for granted then, as unquestionable, that affidavits of facts consistent with the sheriff's return may be admitted, let us examine whether those facts afford a sufficient reason to warrant the Court in discharging the prisoner. * * * * of the Magistrate's Court, and whether, four minutes after his case had been postponed, during which he was speaking to Mr. Jumeaux, his Proctor: and Mr. Jumeaux states that, if the petitioner had failed to appear, his prosecution would have been dismissed. Under these circumstances, it would be mere waste of time to argue this point upon the principles of English Law. The case is too clear. The prisoner was arrested at a period, and under circumstances, which, by that law, fully entitle him to his discharge.

But the case has been argued upon the principles of the Civil Law, and it has been contended, with no inconsiderable show of argument, under the supposed authority of several most respectable writers on the jurisprudence of Holland and Germany, that this arrest is warranted by the laws of the United Provinces, although not defensible by the English.

The *Censura Forensis* of Van Leeuwen, the Commentary of Voet *On the Pandects*, and Gail's *Observations*, have been referred to, as stating the protection afforded a person situated as the prisoner was, has been taken away, because the plaintiff has deposed, in his affidavit to hold to bail in the Provincial Court, that he hath been credibly informed, and verily believes, that the said Siva Poonian was about to leave the jurisdiction

of that Court, and further that the plaintiff, has no mortgage, pledge, or security for his demand, besides the personal undertaking of the defendant.

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Whether under the Roman Dutch Law, a witness in attendance in Court on summons, may be arrested on a civil warrant, even though his creditor is unsecured and he himself is *suspectus fugae.*

I have taken no small pains to examine into the Latin authorities, and I have likewise consulted all the Dutch authorities quoted, except one, and the result of my research is this: first, that none of the authorities go any further than to * * * The words of Van Leeuwen in his *Censura Forensis* are *notandum tamen quascunque res aut personas singulari aliquo jure ab arrestis exemptas, ob fugæ, dilapidationis, aut rerum amovendarum celandarumve suspicionem, arrestari nihilominus posse quia fugitivi et bona sua fraudandorum creditorum causa celantes nullo privilegio juvantur.* pt. 2. lib. 1. ch. 15. § 38.

But I must state that in the enumeration of the places and persons exempted from arrest, I do not find witnesses mentioned. And the ground of protection to a witness or prosecutor is not that he is entitled to any personal privilege, but that, he being employed in the public service, and acting under the compulsory process of the law, that law will protect him for the sake of public justice. But the law will never afford a protection which arises from some individual privilege to him who is endeavouring to evade the progress of the law by flying from the jurisdiction.

I should be prepared to show however, that the affidavit of the plaintiff in the Provincial Court is wholly insufficient to warrant this arrest, even in the case of a defendant who was not protected by the public policy, but merely on account of some privilege annexed to his person, or the sanctity of the day or place, or his attendance on the market.

Gaill is decisive on this point: his words are:—*Prædicta, quod scilicet, debitor de fuga suspectus capi possit, non aliter procedunt nisi tria potissimum requisita concurrant.* Primo *requiritur quod debitor tempore contractus opinione creditoris pro idoneo et solvendo habitus sit: nam si eo tempore facultatibus lapsus, vel de fuga suspectus fuit, idque creditor non ignoravit, sed sciens prudensque cum suspecto contraxit, prehensio non habebit locum et damnum creditor suæ levitati imputare debet.* Secundo *requiritur ut debitum sit certum et liquidum, ex chirographo debitoris vel instrumento publico aut testibus probatum: qui testes ob fugæ periculum etiam debitore non citato recipi possunt.* Tertio *requiritur ut juramento creditoris suspicio fugæ judici probetur: quæ quidem suspicio fugæ veresimilibus conjecturis recte probatur: ut puta, quod debitor latitet, aut sit vagabundus, vel quod nulla bona*

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immobilia amplius possideat. Istis tribus requisitis concurrentibus debitor ex causa civili judicis auctoritate et licentia recte carcerari poterit, alias secus. Et ideo cautela est pro creditore, ut judici in primis fidem faciat de debito, non quidem in forma judicii et per modum recessus, quia periculum moræ hoc non pateretur, sed per exhibitionem obligationis *vel productionem testium qui contractui vel numerationi interfuerunt: item ut jurato affirmet, debitorem tempore contractus sua opinione solvendo fuisse et istam fugæ suspicionem demum post contractum supervenisse. Istis ad eum modum judicii propositis, non debet esse difficilis judex in concedenda licentia capiendi debitorem de fuga suspectum. Cæterum, si simpliciter ad nudam petitionem creditoris, apprehensionem et incarcerationem permittat, debitor qui sua libertate spoliatus est,* ante omnia restitui et relaxari debet. *Lib.* 2, *Observ.* 44, §§ 4-9, pp. 365-6 * * * refers to any thing more than the common arrest upon mesne process and not to privileged persons. But how much reason is there in this country, where the moral principle may be said to be nearly extinct amongst the natives, to require proof in addition to the plaintiff's oath?

The only remaining question is whether this Court be the proper tribunal for discharging the person arrested. Now, it appears to be admitted by both the Advocates, that the Magistrate could not discharge the prisoner at the time he applied to this Court. If so, either we must discharge him, or he must be kept in prison illegally. I think, therefore, we are the proper tribunal. This Court is the supreme tribunal for the criminal jurisdiction of this Island. An illegal arrest has been made of a suitor in a criminal proceeding in the Magistrate's Court. Over that proceeding, and every thing connected with it, we have a control. If it be answered that no contempt has been committed towards this Court, I answer that the contempt is not the ground of discharge; and I dwell more particularly upon this point, because I think both the Advocates seem to have considered that the contempt was the ground upon which prisoners were released in England.¶ The case in 3 T. R. 738† is decisive on that subject. For there is distinctly laid down by East for the prosecutor, and admitted

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¶ On this point, see *Kinder v Williams*, 4. T. R. 378, where it is laid down that the general rule as to privilege from arrest is founded on the contempt of the Court by the arrest of persons who were giving their necessary attendance upon it.—Ed.

† The reference in the Minutes was wrongly given as p. 373. The case in question is *The King v. Stobbs*.—Ed.

by Wood for the other side, without any contradiction, that "it is by no means inconsistent that the arrest should be good with respect to the party arrested, and yet the officer making it may be guilty of a contempt. This is the case with respect to all peculiar jurisdictions in which, if a sheriff's officer arrest a party, he is answerable for the contempt to the Lord of the Franchise, and yet the arrest is good; and the Courts always refuse to discharge the prisoner." And in the very case then before the Court, they contended that the prosecutor was entitled to his discharge, but that an indictment lay, because the arrest without the royal licence was a contempt of the king, and the true distinction is likewise made, namely, that in the invasion of the rights of an individual by illegally arresting a person within privileged jurisdiction, a civil action may be maintained. Nor is this the only instance in which one Court is called in to assist another in enforcing its process or protecting it from contempt. Courts martial have by law no power to commit a witness for non-attendance, after summons, and the Court of King's Bench is called in to assist them in punishing a witness who disobeys their summons.

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Courts Martial have no power to commit a witness for non-attendance, after summons.

The same law prevails for acts of contempt towards the Coroner. Anciently witnesses who disobeyed his summons were punishable before the Court of Eyre. Now they are liable to be punished by the justices of jail delivery.

Under these circumstances, I am decisively of opinion that the prisoner should be discharged.—(Per *The Supreme Court of Judicature*).

1827.

March, 21.

Present:—Ottley, J.

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Siva Poonian, *vs.* *Abdul Cader*, *et al.*

Partnership, evidence of.

Dealing generally together, conducting business in the same premises, and other cir-

In delivering judgment on this case, I beg to be understood as not founding my opinions upon any variance which may be supposed to exist between the case set forth in the answer and the case proved in Court. The case, if satisfactorily proved, would be the same on the record as was made out in evidence.

The plaintiff brought this action for a trespass upon his boutique, and a seizure of his property. The first defendant

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stances shewing a joint interest raise a strong presumption of partnership.

A decisive creterion is participation of profit and loss in any speculation, but not merely a purchase to be paid for by the parties.

denies the charge. The second defendant pleads a partnership between the plaintiff Wapoo Saiboo and himself, that an action was about to be brought against the plaintiff and the rest of the partners, and that for the purpose of protecting the joint property, he entered the premises and exercised various acts of ownership, which, he was entitled to do. The partnership is denied, and upon this, issue is taken.

I put out of the question the assault on the servant. The action is brought by the master, and no such violence was made use of as deprived the plaintiff of his servant's exertions. Had the action been brought by the servant himself, perhaps a different conclusion might have been formed.

The plaintiff, having denied the partnership, proves first that the boutique was taken in his own name, and from the time of his hiring it, until the final closing of the concern, continued to be hired. It has appeared in evidence also that the premises in which the supposed partners carried on their concerns, were separated into two distinct departments; that taxes were separately paid for each apartment of the partnership, and that until the time in which the alleged trespass was committed, no consolidation of the premises was made.

Wapoo Saiboo, one of the members of the supposed partnership, was called for the plaintiff, and he denied that any partnership existed. If that man's evidence were free from suspicion, his testimony would be conclusive, because he must have known the fact if the partnership existed. As far as the evidence before the Court can lead us to a judgment, Wapoo Saiboo, who is the person now confined in jail, has no interest to deny the existence of the partnership. The next witness, whose testimony is material, is Mahomet Abooker, the servant of the plaintiff alone, according to his own statement, the servant of the defendants also, according to their statement. He has no interest, that I am aware of, in the event of this suit; if he had any, it would be rather to impose a liability on the defendants for his wages and to increase the chances of payment to himself. He had every opportunity of becoming intimately acquainted with the transactions of the parties, and yet he states in the most unequivocal language, that he was hired by the plaintiff alone, and that the business was conducted for the plaintiff solely. The next piece of evidence is the testimony of one of the arbitrators between the plaintiff and Wapoo Saiboo. He says that he was appointed by the defendant to examime the accounts, and he believes, all the accounts between the said Wapoo Saiboo and the plaintiff. This species of evidence weighs very little in my mind, because, it is consistent with the defendants' case, that disputes might

have arisen on some points between Wapoo Saiboo and plaintiff, yet, that no items of the partnership concern might have been introduced before the arbitrators. But as the second defendant desired the accounts to be referred to this witness, and as the statement of the account tends to confirm the testimony of Wapoo Saiboo, it may be supposed to have some weight. I do not however rely upon it as materially affecting the case.

It appears from the evidence that the second defendant is a pensioner on the first defendant, it appears also that Wapoo Saiboo is in prison for debt; and we may therefore conclude that neither of them is in independent circumstances. The first defendant certainly appears to have had an interest in supporting the notion of the partnership, if those persons, Wapoo Saiboo and the second defendant, were indebted to him.

The seizure of the boutique and property by the second defendant, his being accompanied by the first defendant, if not, his being supported by the first defendant, and the suing out of the writ immediately after that seizure, and the notice of intention to sue it out before it issued, are circumstances perfectly consistent with the notion of collusion between the first and second defendants, and not easily reconciled with the notion of a hostile proceeding on the part of the first defendant against the second.

The evidence on the part of the defendants proves that, on one occasion, the tax for the boutique in question was paid by the second defendant, and that some rice was brought for the use of the plaintiff, Wapoo Saiboo, and the second defendant. The purchase of one or two investments of rice, to be paid for jointly by the plaintiff, Wapoo Saiboo and the second defendant, would not prove a general partnership. Purchases of a similar nature frequently made would go further to prove it. But the only criterion by which we can judge decisively of the existence of a partnership, is a participation of profit and loss in any speculation, and not merely a purchase to be paid for by the parties. A partnership in a particular transaction may appear, and yet no general partnership exist between the same persons. But dealing generally together, conducting business in the same premises, and other circumstances showing a joint interest, raise a strong presumption of partnership.

I do not find however upon the evidence, any sufficient ground to induce the Court to believe that a partnership existed between the plaintiff and the parties alleged in the answer. I believe that the first defendant and the second were in company, and acting in concert, at the time when the premises were entered by the second defendant, and

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therefore, I must pronounce judgment with costs against both the defendants.

But I have a new difficulty to contend with. Damages must have arisen, if the plaintiff's property have been illegally taken by the defendants. No evidence has been given of the amount of loss sustained ; nor does it appear that the plaintiff has endeavoured to regain possession of his boutique or the contents of it. With this deficiency of proof, and feeling that I must decide the case upon the evidence before me, I can only award nominal damages. I, therefore, assess damages to the amount of one pound sterling against the defendants.—(Per *The Supreme Court of Judicature*).

April, 10.

April, 10.

Present :—OTTLEY, J.

In the matter of the goods of Naina Marikar, *deceased*.

The widow's right to the administration of her husband's estate, and under what circumstances, such administration may be committed to others

The present case is one of a contest for administration between the widow on the one part, and the mother and sister of the deceased on the other part. If the case were decided in favour of the latter or either of them, the Court might avoid the necessity of determining a question not only of considerable importance to the suitors, but which appears to involve some diversity, if not an absolute contradiction, between the opinions of the preceding judges. But my opinion being in favour of the widow, I feel called upon to fix the practice on the subject.

The value of certainty and uniformity of practice.

That contradictory decisions should have been pronounced in this Court is a matter of regret, because, if one subject can be selected which more than any other it is the incumbent duty of judges to attain, we may say that certainty and uniformity of practice is that object. It is an object which I consider of such magnitude, that unless it be attained, no exhibition of talent, no display of erudition or of ingenuity, can render the proceedings of the Court respectable. I find upon looking over the precedents that, upon the first establishment of the Court, the practice prevailed of granting administration to the widow ; that from 1804 no instance occurs of administration having been granted to the widow, until 1820 ; that in 1816 an application was made by the widow of Gunn for administration, and that application was refused ; that in 1820 my immediate predecessor and late colleague, Sir Hardinge

Giffard, entered very largely into the discussion, and after deliberation, pronounced an elaborate judgment in favour of the widow's claims.

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Now, in remarking upon them, we may observe in the first instance that no rejection of the claim of the widow in any particular instance is a denial of the principle which the widow seeks to establish, unless the principle of exclusion of her right be recognized and declared by the judgment, because the grant of administration to the next of kin is not inconsistent with the widow's claim, but may be only the exercise of the discertion of the judge in selecting one of two persons, each of whom is eligible. But every grant of administration to the widow is a recognition, not only of her individual right, but of the principle upon which her right is founded. Precedents, however, which pass without argument, possess less weight than those established after a full discussion of the claims of the opposing parties.

Precedents which pass without argument possess less weight than those established after a full discussion.

The argument of Sir Hardinge Giffard † in 1820 enters so fully into the merits of the case, and takes such an enlarged view of the conflicting rights of the parties that I shall do little more than refer to those arguments, support them by cases from the Madras Reports, and add one argument which appears to have escaped his attention. I do so with more confidence, because the practice of the Court since 1820 has been conformable to the principle laid down in the case then before the Court, and any deviation would be attended with all those bad consequences, which uncertainty and fluctuation of opinion in judges are so much calculated to introduce.

Sir Hardinge Giffard has stated that the practice of the Court of Madras goes further than we have gone in this country, to establish the right of the widow; because in the Madras Charter (24th clause), creditors as well as registrars are named amongst the persons entitled to administration; and yet letters of administration are granted to the widows. In looking over the Madras Reports, I find two cases: the first is in 1812, in which *Chellammah* was plaintiff and *Barrow* defendant. In this case, the court did not grant letters of administration, but fully recognized the widow's right, and what is worthy of attention, allowed her to exercise the right of administratrix, without imposing the burthen of taking out letters of administration; yet the principle is fully recognized. The next case, in which the right of the widow is recognized,

† Reported *supra* in p. 7 of these Reports.—Ed.

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is that of *Vencataram vs. Vencata Letchme Umma*, in 1815. It appears by that case that a contest had arisen between the brother of the deceased, who had contested the right of administration with his widows, two in number: and there the Court had decided in favour of the widows, and granted letters of administration to both of them in preference to the brother. This grant had been made by the Mayor's Court, and was fully recognized by the Supreme Court which succeeded to the Mayor's Court.

The meaning of "next of kin." The widow is so to her husband.

The principal objection however is that the 27th clause of the Charter mentions only next of kin, though, in default of the next of kin, the Court is directed to grant letters of administration to the Registrar. Now the first answer to this is that the Court of Madras, acting upon a similar Charter have put the same construction upon it that the judges have put upon our Charter, and have even carried the principle further. But secondly, the word kin is not confined to kindred by blood: the Latin name for kin is *consanguineus* or *cognatus*, which means certainly kindred by blood, or *affinis* which means kindred by marriage; and although the wife be not, properly speaking, a kin to her husband, yet she is so called even by legal authority. See *Calv. Lex.** under the word *affinis*. Were there a much nearer approximation to an equilibrium in the weight of the arguments adduced in this case, the great evil arising from unsettled practice, and the necessity of excluding the husband equally with the wife of the deceased, would, in my opinion, operate forcibly to make the scale preponderate in favour of the widow's claim. But the widow in this case, is only fifteen years of age or thereabouts. The Charter differs from the Madras Charter in respect to the age of the person to whom the grant is made. It is here fixed.

The uncertainty which would necessarily arise, as well as the ludicrous and indecent evidence to prove the puberty of the widow, were we to fix upon any other age than that prescribed by the Charter, are inconveniences which are too great to be overlooked. I must, therefore, decide in favour of the widow's right, and in this particular case, where so much hostility is admitted to exist between the parties and injury would arise from a different course than that which I mean to pursue, I must commit the administration to the Registrar *durante minoritate*, with leave to the widow to apply to have the letters of administration to the Registrar

* *Calvini Lexicon juridicum juris Caesarei.* Gen., 1645, fol.—Ed.

cancelled, when she arrives at the full age of 21 years.—(Per *The Supreme Court of Judicature*).

April, 28.

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*De Busche vs. Young and Muskett.**

C. and W. entrusted goods of their own, as also other goods consigned to their care by third parties in London, to M. and Y. on commission sale. M. and Y. rendered C. and W. account of general sales of all the goods, without distinguishing the different allotments. C. and W. became bankrupt. *Held* that M. and Y. were entitled to withhold from the assignees the proceeds of the goods belonging originally to

This case, instituted by the attorney of Bell and Borradaile, assignees of the estate of Clarke and Winter, bankrupts, and arising out of the admission of the respective parties, is humbly submitted for the opinion of this honorable Court.

Early in the year 1823 Messrs. Clarke and Winter, then being in partnership, sailed from London in the ship *Madras* (of which Mr. Clarke was master and Mr. Winter supercargo) with a cargo consisting partly of goods belonging to themselves and destined by them for the Madras market, and partly of goods consigned to the care of Clarke and Winter by two or three different houses in London and which were to be sold by Clarke and Winter on commission at Colombo. In July 1823, the ship arrived at Colombo, where the greater part of the goods last mentioned were landed and left in charge of Messrs. Muskett and Young and then proceeded, in charge of the said Messrs. Clarke and Winter, to Madras and Calcutta, at which place they disposed of part of both consignments. The remainder, for which a market could not be found there, was brought back in the same ship to Colombo by Mr. Winter (Mr. Clarke remaining at Calcutta), and was landed there in December, 1823. Part of the goods, shipped by the houses in London and landed as above stated at Colombo, had in the mean time been sold by Messrs. Muskett and Young, acting

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* The judgment in this very elaborately argued case is signed by three judges: *Palmer*, C. J., *Ricketts*, J., and *Comyn*, J., names across which I have not come in any other judgment, between the years 1820—1832. Besides, I do not see how there could be three judges, when the constitution of the Supreme Court of Judicature of Ceylon during that period admitted only of two. But Mr. Justice Ricketts in signing the judgment dates it at *Madras*, which makes it possible that this decision may have been one of the Supreme Court of *Madras*, and may have been ordered by our judges (for reasons of their own, not ascertainable now, in the general imperfection of our records), to be incorporated with the Minutes of the Supreme Court of Judicature of *Ceylon*.

The uncertainty as to which Court we are to attribute the present judgment, is not cleared up by another judgment which is recorded next to it in an incomplete form. The parties and the matters in issue are identical in both these cases. I print them, as they stand, leaving the reader to form his own conclusion on the subject.—Ed.

1827. April, 28. as the sub-agents of Clarke and Winter, and on the ship's return, Clarke and Winter delivered the remainder of their own investment to Muskett and Young to be disposed of in like manner.

the third parties in London, for the purpose of paying them over to them.

The goods composing the two consignments were from that time disposed of by Messrs. Muskett and Young indifferently, as occasion required, and no separate or distinct accounts were then, or have ever been, kept of the two investments; Mr. Winter sailed in the said ship *Madras* from Colombo on her voyage to England about 21st January 1824, on which occasion Muskett and Young rendered an account to Clarke and Winter of the goods then sold, in which the accounts sales of both investment were mixed up together and by which a balance appeared due to Clarke and Winter of Rds. 10,554. 7. 3. On the 19th February 1825, Clarke and Winter severally committed acts of bankruptcy, on which a commission issued and they were both declared bankrupt on the 26th of the same month. On the 1st July, 1825, Muskett and Young at Colombo made out another account current to Clarke and Winter referring to account sales in which the goods of both investments were, as before, mixed up together and transmitted, both the account current and the account sales, to Mr. Winter in England. Before they arrived, however, Winter had sailed for Colombo and they were handed over to the assignees. In November 1825, Winter arrived at Colombo and entered into partnership with Muskett and Young, as the head of that Firm.

The present action has been instituted by the direction and on behalf of the assignees to recover from Messrs. Muskett and Young the sum of Rds. 16,008, the amount which, by the last mentioned account, is stated to be due to Clarke and Winter; and also for the proceeds of goods since sold, and for the goods still remaining unsold. But it is now contended on the part of Muskett and Young that, with respect to the goods originally consigned by the houses in London (supposing they can now be distinguished from the rest), they can only be called upon to pay the proceeds to the original consignors, and therefore that they are entitled to deduct such proceeds from the amount claimed by the assignees. In support of this objection, they allege (and offer to prove by the evidence of Mr. Winter if the Court should consider him a competent witness), that they, Messrs. Muskett and Young, received positive instructions from Mr. Winter to keep the accounts of the goods consigned to Clarke and Winter, distinct from those belonging to themselves, and also to make distinct remittances though they admit that these instructions were wholly neglected.

To this the assignees answer, that as the two investments have been mixed up together, the sales having all taken place as of goods belonging to Clarke and Winter, and the accounts of both having been rendered indiscriminately to Clarke and Winter, Muskett and Young, (more especially as they were only acting as the sub-agents of Clarke and Winter) have no right now to make any such reservation, in favour of the original consignors, who can only come in by proving under the commission, which they may have done.

The questions therefore on which the decision of the Court is prayed for are,

1st. Whether under the circumstances above stated, the defendants, Messrs. Muskett and Young, are entitled to withhold from the assignees the proceeds of the goods belonging originally to the said houses in London (supposing they can be distinguished), for the alleged purpose of paying them over to the shippers of the goods.

2ndly. Whether the position for which the defendants contend would be strengthened by proof that Clarke and Winter had given instructions, before their bankruptcy, to Muskett and Young to keep the accounts of the investment separate; those instructions never having been acted on by Muskett and Young.

Two other questions have arisen with which, however, it is unnecessary to trouble the Court at present:—

1st. Whether Mr. Winter be a competent witness to prove that he gave instructions to Messrs. Muskett and Young to keep the accounts separate; 2ndly. Whether the letters from the consignors to Messrs. Muskett and Young, written previously to the bankruptcy, be admissible evidence to prove that a claim had been made by them.

The following arguments have been adduced:

On the part of the plaintiff, it was contended that, with respect to the goods which had been sold (with respect to the goods yet remaining unsold, and which could be proved to have been mere consignments to the bankrupts as factors, the plaintiff agreed to abandon his claim), and of which the proceeds had been paid to Muskett and Young, the consignors themselves, even if they were before the Court, could make no legal claim. The general rule is perfectly established, that if goods are consigned to a factor who sells them, receives the price of them, and becomes bankrupt, the proceeds vest in the assignees, unless they have been paid in notes still unsatisfied, or kept apart, in bags or laid out in other goods or the like, then they remain separate and distinguishable from the rest of the bank-

1827. April, 28. rupts property, *Whitecomb vs. Jacob*, 1 Salk 160, *Ryal vs. Rollo*, 1 Atkyns, 204, *Ex parte* Dumas, *ibid*, 234 [275], *Scott vs. Surmam*, Willes 400. This last is a very leading case and contains indeed all the law on the subject. It was there held, and not disputed, that even where the price of the goods purchased was set off against a debt due from the purchaser to the factor, such set off was equivalent to payment and the amount became part of the Estate. That sum was surely more capable of being distinguished and separated than the different items in the account sale here, which are very numerous and which, it is admitted, are made up of both consignments indiscriminately. The cases of *Scrimshire vs. Alderton*, 2. Strange 1183,—*Tooke vs. Hollingworth*, 5. T. R. 226—7, and *Taylor vs. Plumer*, 3. M. and S. 562, in which Lord Ellenborough enters very fully into the law on this subject, were also cited. Then, could it be said to vary the principles on which these cases had heen decided, that the price of the goods had been received, not by the very hands of the bankrupts, but by those of their agents? The general rule is that payment to an agent is payment to the principal, and nothing seems in this present case to make it an exception to the rule. The true question is, has there been a payment by the purchasers without specific appropriation? If so, it matters not whether such payment was to the bankrupt himself, or to a servant or agent on his behalf. And such general payment would seem to form part of the estate, even though it had not been mixed up with payments of other kinds. Still more must these payments be so considered, blended and confused, as they have been, both in the account sales and the accounts current, with the sums received for the property belonging originally to the bankrupts. Nor is it any answer to say that the bankrupt had instructed their agents to keep the accounts distinct. The confusion of accounts has taken place, and as far as that fact is necessary for the consideration of the case, it matters not by whose order. Even if the consignors themselves had ordered distinct accounts to be rendered, they who confided in unfaithful factors ought to suffer rather than the general mass of the creditors, to whom it has been "the aim of legislation, in all statutes concerning bankrupts, to give an equal proportion of the bankrupt's effects as far as possible," *Per curiam* in Atkyns 183: such, it is contended, would be the answer to the consignors, if they were now setting up this claim. Still less can it be supported on the part of the defendants, by whose neglect, it is said, the proceeds in question became mixed up with bankrupt's estate. That confusion, however, was so far sanctioned by one of the bankrupts, who it must be recollected has now become a partner of the defend-

ants, that he received the accounts current rendered to him by the defendants in January 1824 and delivered it himself to his assignees. 1827. April, 28.

On the part of the defendants, it was argued as follows:—

It has not been contended by the plaintiff that all the articles from the sale of which the balance arose were the property of the bankrupts, but when the accounts had been drawn out and transmitted, the whole property included in that account was so mingled with the bankrupt's estate that it could not be distinguished, and therefore that property became vested in the assignees under the commission. Amongst other cases cited in support of the plaintiffs position, that of *Scott vs. Surman* in Willes 400, has been more particularly dwelt upon as containing all the law on the subject, but the present case differs from that in the following particulars: *First.* In the case of *Scott vs. Surman*, a balance of accounts appears to have been struck between the factor and the purchasers and that the balance due by the former was paid to them by easy allowance in the account out of the property of the principal, and that notes were drawn in favour of the factor afterwards deducting his own debt. *Secondly.* All this took place before the date of the commission. *Thirdly.* The factor in that case was the person employed by the owner of the goods and entrusted by him with disposal. In the present case no actual payment has been made to the bankrupts, nor any constructive payment, except the mere statement of an account between the factors and their agents, both of whom deny the accuracy of the account in its present form. Let it be allowed, for the sake of argument, that the consignors in England were as much bound by the acts of the defendants as by the acts of their own immediate agents: they could not have been placed in a worse situation by the conduct of the former than by that of the latter; or suppose that the bankrupts Clarke and Winter had themselves stated the account in January 1824, by which their estate seemed considerably to augment in value at the expense of the consignors, would it be contended that such a statement would have estopped the consignors and precluded them from examining the accounts? The defendants lay no claim to the property in question, but it has been contended on their behalf that many of the articles of which the account is composed belonged to certain consignors in England, who entrusted the same to Clarke and Winter, as factors; that the defendants held the property liable to the same trusts, and for the benefit of the same persons as Clarke and Winter; and as to those items, it is alleged by them that the proceeds arising from the sale of such articles

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must be paid over to the consignors and not to the bankrupts estate. Taking the facts as alleged by the defendants to be true on the whole, or even in any considerable proportion, and supposing the defendants were to be excluded from offering any evidence as to the ownership of the goods, would not the effect be that the goods of one man would be applied in discharge of the debt of another, and do any of the cases cited by the plaintiff's counsel warrant such a conclusion, or lead to a different inference from that which the equity of the case requires? The cases of *Garret vs. Cullum* quoted in Buller's *Nisi Prius* p. 42, and reported in Willes, resemble the present. The plaintiff in that case employed Burtwell and Mason to sell goods for him. They sold a parcel of those goods to a stranger to whom they were delivered as goods of Burtwell and Mason, and so charged in his account. The same goods were entered as Burtwell and Mason's in their own books; thus, as far as the account went, both parties entered them as goods of Burtwell and Mason. Burtwell and Mason became bankrupts before payment. The assignees received the money for the goods, but, upon an action brought against them, were forced to refund. In the case of *Favenc vs. Bennet*, 11 East 36, goods were sold by a broker for £707 10. 8. The principal was not named. The purchasers were indebted to the brokers for other goods in the amount of £272 10. 4. The purchasers paid the brokers the sum of £800 in a bill, which was more than what was due for each item separately, but less than the amount of them both, and the payment was made to the brokers generally. Afterwards the brokers stopped payment, and it was held that the sum paid ought to be equitably apportioned between the several owners of the goods. In that case the brokers dealt in their own name; payment was made to them without reference to any particular items, yet the persons entitled to the goods were considered entitled to the proceeds. The same principle, viz., that the confusion of accounts alone without payment, or what is equivalent to a payment, does not debar the right of the true owner, is distinctly recognised in all the cases on the subject. But it has been contended on the part of the plaintiff, that provided payments have been made to the defendants, who were the agents of Clarke and Winter (the bankrupts), the same are equivalent to an actual payment to Clarke and Winter themselves, and that the confusion of accounts by the defendant is the same as if it were the account of Clarke and Winter themselves, and in support of this position the rule of law that payment to a factor is payment to the principal, has been relied on. In applying this rule to the present case, it will be necessary to keep in view the principle on which goods

in the possession of a bankrupt as factor have ever been held liable to the payment of his debts under any circumstances. The object of the account has ever been considered to be the false credit which long possession of property by a factor is supposed to hold out to the world, by which possession, goods are taken as his own, and credit given to him on that account; and unless it can be shown that the possession of goods by the defendants, or the receipt of monies by them, has had the effect of deceiving the public, or holding out any false colours in favour of these bankrupts, it will be impossible to reconcile the rule of law relied on by the plaintiff, with the principle just mentioned. But can it be even presumed for a moment, that such a possession by the defendants, or payments to them, could have the effect of holding out a false credit in favour of the bankrupts; and if not, ought not the account to be liberally interpreted, in favour of the real owners of the goods? "The assignment under the commission passes only such property as the bankrupt is conscientiously entitled to, and the assignees take such property subject to any equity to which it was liable in the bankrupts hand." Per Curiam *Parke vs. Eliason*, 1. East 544. Suppose the defendants in this case were the bankrupts, would it not be insisted on that the proceeds of the goods in question ought to pass by the assignment of their property, and would it be just, then, that the consignors should incur a risk not only by the bankruptcy of the defendants (in whose possession the goods were), but by the bankruptcy of Clarke and Winter also. The defendants are to be considered rather in the light of purchasers, by whom no payment having been made to the bankrupts previous to the bankruptcy, the consignors ought to have a preference on the proceeds of their goods still in the hands of the defendants. The rule relied on by the plaintiff, viz., that payment to the factor is payment to the principal, can be said to be general only in as far as it relates to the principal and buyers. But even there it admits of exceptions. The sale of a factor creates a contract between the buyer and principal, and the payment by the former to the factor would be a discharge to him, and bar any claim of the principal against him; but if the principal give notice to the buyer not to pay the factor, he would do so at the peril of having to pay the money again to the principal. Not a single case has been cited, on the part of the plaintiff, to show that the rule has been extended further than what has just been stated, but that the contrary has been established (viz., that payment to a factor is not equivalent to payment to the principal until the payment has been actually made by the former to the latter) will appear by the cases of *Buller vs.*

1827. April, 28. *Harrison* in Cowper 565, *Sadler vs. Evans* 4 Burr. 1984 and Buller *Nisi Prius* 133, *Cary vs. Webster*, Stra. 480. In these cases it has been further held that a mere placing of the money to the account of the principal by the factor, without an actual payment by the latter to the former, does not debar the persons entitled to such money from recovering it of the factor. It is true the consignors are not parties to the present suit, but are they to suffer more on that account? And are not the defendants justified in resisting the payment of the proceeds of the goods of the consignors to any than to the real owners, or will it be contended that the absence of the consignors strengthened the claim of the plaintiff? If the consignors had been within the jurisdiction of this Court, they would have been cited by the defendants, according to the course of practice in the Civil Law, to intervene if they could find it necessary, and to prefer their claims, but it is offered to be proved in evidence, if the Court should consider it admissible or relevant, that they have written to the defendants on the subject, and even very lately, one of the principal consignors has addressed himself to Winter, desiring him to obtain from the defendants a settlement of accounts and to remit to him the proceeds of his goods. It is true that the bankruptcy took place in February 1825, but it by no means follows nor has it been proved that the account of 1st July 1825 was rendered by the defendants with knowledge or notice of the bankruptcy, and the said account never came into the hands of the bankrupts, so that they had no opportunity of stating their objections as to the correctness or incorrectness of it, or of offering any explanation to the assignees.

From the arguments urged on behalf of the defendants, and on the authority of the cases cited, the following inferences may be drawn on which the defendants rely :—

1st. That whenever it is apparent that the price of goods has not been actually paid to the agent previous to the bankruptcy, and the money so mingled with his estate as to render it indistinguishable, the real owner may come in, and enforce his rights,

2ndly. That the mere confusion of accounts, even by the bankrupts themselves, without payment, is not so conclusive in favour of the assignees as to preclude all proof of the claims of the real owners, or to debar the defendants from opening the accounts rendered by them to the bankrupts, for the purpose of separating the property belonging to the consignors.

3rdly. That the receipt of money by the defendants is not equivalent to a receipt by Clarke and Winter (the

bankrupts) themselves, nor the confusion of the accounts by the former tantamount to a similar act by the latter, so as to bring the case within the act, and to exclude the real owners, from that preference to which they are equitably entitled on the proceeds of their goods. 1827. April, 28.

For the plaintiff in reply :—This case does not depend on the question of false credit of the assignees, for the assignees do not claim the goods of other parties remaining unsold in the hands of the bankrupts. The question is whether the sums paid for the goods sold before the bankruptcy did not form part of the bankrupts estate. The position "that no constructive payment has been made except the mere statement of accounts between the factors and their agents" is incorrect, for it is admitted that part of the proceeds of the respective goods have been paid by the purchasers and received by the agents. The cases of *Buller vs. Harrison*, *Sadler vs. Evans*, and *Cary vs. Webster* are to a different point viz., that if money be paid by mistake to an agent, the person who so paid it may, if it be not paid over to the principal, recover it back from the agent. It is said that *Scott vs. Surman* differs from the present case. It certainly does ; but the difference is in favour of the plaintiff, for in *Scott vs. Surman* there was no actual payment by the purchaser, and yet, so much of the purchase money as had been set off by the vendor against a debt due to him by the factor, was held to pass to the assignees. In *Garrat vs. Cullum*, cited by the defendants, the brokers became bankrupts before payment by the purchasers. *Favenc vs. Bennett*, is extremely strong in favourof the plaintiff. For the principle on which that case was decided, viz., that the payment should not be applied to the satisfaction of the debt of one only of the original owners, but should be apportioned between them according to their respective claims, shows that, if that had been a case of bankruptcy instead of the mere insolvency of the factor, the owners must have come in as general creditors. It has been urged that if the assignees succeed in this action, the effect will be that the goods of one man will be applied in discharge of the debt of another. This observation might be applied with equal justice to every instance in which a creditor of the bankrupt is obliged to come in with the general mass. It is indeed the very object and policy of the bankrupt laws to bring all the property into the common stock as far as possible, and this is much more consonant with the spirit and equity of those laws, than that the body of creditors should suffer for the sake of those invisible parties who, as yet, have never even preferred their claims to the Court.

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Further argument on the part of the defendants appended by consent:—The defendants, in support of the arguments urged by them, further contend that whether the apparent augmentation of the bankrupt estate arises from the mingling of the proceeds of the property of others with those of his own, or from the possession of such property itself, the principle of false credit applies with equal force, and the object of the act is the same in either case, and it ought to be shown that the act of the defendants has produced the effect of such false credit in favour of the bankrupts, before such act can be identified as the act of the bankrupt themselves. The reason it is said that money, proceeds of goods confided to the bankrupt or factor, has been held to form part of his general estate is, that money has no ear-mark, and so cannot be distinguished except kept separately; but will it be contended that money in the hands of a third person and which has never passed into the bankrupt's possession, is equally incapable of being distinguished, or that it is not a sufficient separation from the mass of the bankrupt estate so as to give the real owners an equitable right to it? Unless it can be shown that payment to a factor separates any further than as to a dissolution of the contract created by letter between the principal and the buyer, the position of the defendants, that no payments have been made to the bankrupts in this case, is certainly tenable. The case of *Buller vs. Harrison* and other cases cited by the defendants, go sufficiently far to show an important exception to the rule relied on by the plaintiff, and these cases are in a great measure in point; for in the present instance the defendants have erroneously included, in the accounts rendered by them to the bankrupts, property belonging to other parties and they wish to rectify that error. Nothing has been adduced by the plaintiff to show that the cases of *Scott vs. Surman*, *Favenc vs. Bennett* and *Garrat vs. Cullum*, particularly the latter, are not applicable to the defendants case. "Although the principal view under all commissions of bankruptcy is to put the creditors, as near as may be, on a level, yet, that must be done only with regard to the bankrupts estate, for, if the matters in question are not relative to his estate in law or equity, especially in equity, the person who has a legal interest in anything should be entitled to it," *Ex parte* Dumas. The reason that the consignors have not been able to appear before the Court is obvious. They are in England and cannot possibly have any notice of these proceedings But it is offered to be proved that they have made a claim on the defendants, who in consequence consider themselves bound to resist the payment of the proceeds of their goods to the assignees.

Judgment :—

The general right of assignees under a commission of bankruptcy is thus clearly stated, (in *Ex parte* Dumas, 2 *Vesey* 185, one of the cases cited by the plaintiffs):—"If the subject matter of the question is not the bankrupt estate in point of law and equity, especially if not in equity, the conse quence is that it is not considered in the distribution as his estate. But the person entitled either to the legal interest for his own benefit, or to the equitable, is entitled to have that in specie. For the assignees under the commission take the estate of the bankrupt, and any *legal interest* in the bankrupt, subject to all the same equities as they stood in the bankrupt at the time of the bankruptcy."

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The assignees under a commission of bankruptcy take the estate of the bankrupt, and any legal interest in the bankrupt, subject to all the same equities as they stood in the bankrupt at the time of the bankruptcy.

Now, to apply this principle to the present case. The moneys received by Messrs. Muskett and Young, not having been paid over by them to Messrs. Clarke and Winter, constituted a *mere debt* from the former to the latter, a mere *chose* in-action, which the assignees have the like remedy to recover as the bankrupts themselves had, but no further. And as the bankrupts, had they remained solvent, clearly could not in equity, even if they could at law, which is very questionable, have recovered for their own use the amount of such proceeds, so, as agents of their own principals, the real owners, neither can their assignees. Without therefore entering further into the argument, I am of opinion, *First*: That under the circumstances stated in this case, the defendants Messrs. Muskett and Young are entitled to withhold from the assignees the proceeds of the goods belonging originally to the houses in London which are referred to (supposing they can be distinguished), for the alleged purpose of paying them over to the shippers of the goods. *Secondly*; I think the position for which the defendants contend would (under particular circumstances which do not appear to occur here) be strengthened by proof that Clarke and Winter had given instructions before their bankruptcy to Muskett and Young to keep the accounts of investments separate, although these instructions were not acted upon by Muskett and Young; but I do not think such proof is in any degree necessary under the circumstances in this case. *Thirdly*: With reference to the question on the margin, I am of opinion that Mr. Winter is an admissible witness to prove that he gave instructions to keep the accounts separate, for the effect of such evidence would be to diminish his estate and not to increase it. And lastly I am, of opinion that letters of the consignors written before the bankruptcy are admissible to prove a demand on their part.

Ralph Palmer, C. J., 28th April, 1827.

1827. April, 28. I think that Messrs. Muskett and Young are entitled to withhold from the assignees the proceeds of the goods belonging to the houses in London for the purpose of paying them to the owners.

The only ground on which the assignees can have a right to the proceeds is that they were paid over to the bankrupts before the bankruptcy, so that they became indistinguishably mixed up with the bankrupts' estate; but in this case, the proceeds have never been paid over to the bankrupts, for I think that the circumstances, which appear to be relied upon as constituting a payment to them, namely, the payment of the proceeds by the buyers to Messrs. Muskett and Young, as the agents of the bankrupts, and the rendering of the account to the bankrupts in which they are credited with those proceeds as if they were their own property, cannot be considered as a payment to them of those proceeds. They are in fact still remaining in the hands of Messrs. Muskett and Young, and are capable of being distinguished from the proceeds of those goods which were the bankrupts' own property.

I think that the fact of the bankrupts having given instructions before the bankruptcy to Messrs. Muskett and Young to keep the accounts of the investments separate is quite immaterial in this case, for if the bankrupts had represented the consignors' goods to be their own, and Messrs. Muskett and Young had, when they sold and rendered their account of the proceeds of those goods, had no notice of their being the consignors' property, the right of the consignors to recover the proceeds now from Muskett and Young would not have been affected by it.

G. H. Ricketts, Madras, 28th April 1827.

I am of opinion that the defendants Messrs. Muskett and Young are entitled to withhold from the assignees the proceeds of the goods belonging originally to the houses in London. These proceeds, as long as they remain in the hands of Muskett and Young, are distinguishable from the bankrupts' property, and would not pass under the assignment. But supposing they did pass, so that the assignees, in virtue of the original dealing of the bankrupt with the defendants, might call upon the defendants to account for them, yet I think that the owners might recover the proceeds from the assignees, and that a Court of Equity would at any time step in, and by compelling the parties to interplead, protect the owners, in whom (independently of any form of technical English proceedings at law) I consider the absolute rights to the proceeds vested.

2nd. In this view of the case, I do not think it necessary for the defendants to strengthen themselves by proving any

instructions to keep accounts separate. The grand feature in this case is that the proceeds remain distinguishable in the defendants hand, and I do not think the right of the owners can be strengthened or perjudiced by any prior agreement between the defendants and the bankrupts. 1827. April, 28.

With respect to the two questions in the margin, I apprehend that Winter is a competent witness inasmuch as his evidence must tend to diminish his surplus, and that letters affecting the defendants with notice of the consignor's property in the goods prior to the bankruptcy are unexceptionable evidence of a demand by them.

R. B. Comyn, 28th April, 1827.

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*De Busche, Agent of Bell and Boradaile, assignees of Clarke and Winter, bankrupts, vs. Young and Muskett.**

Where the price of goods, consigned to a factor, has not been actually paid and settled in account with the principal or his agent and in the meanwhile the factor becomes insolvent and the money has been so mingled with his estate before the bankruptcy as not to be distinguishable, the principal may come in and enforce his rights.

This suit was originally instituted by the plaintiff on behalf of the assignees of Clarke and Winter, to recover the sum of £1200 12 1 due on an account current, rendered by the defendants to the bankrupts Clarke and Winter, and dated first July, 1825, together with interest on the same at nine per cent. from that date.

The libel contains other charges and items which, not being immediately connected with the subject now under discussion, may for the present pass unnoticed.

The plaintiff does not contend that all articles from the sale of which the balance arose, were the property of the bankrupts, but he contends that, where the account had been drawn out and transmitted, the whole property included in that account was so mingled with the mass of the bankrupt's estate that it could not not be distinguished, and therefore, by the policy of the bankruptcy laws, that property became vested in the assignees for distribution among the general creditors of the bankrupt. Perhaps, it will be better to illustrate the point by a short recapitulation of the transactions between the assignees of Clarke and Winter and the defendants.

The point now submitted for the decision of the Court arises out of the following circumstances. Early in the year 1823, Clarke and Winter sailed from London with a cargo consisting partly of goods belonging to themselves, and partly

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* See foot note in p. 95. The slight incompleteness of this judgment, I have remedied by referring to the English cases cited, and restoring a few words here and there which were missing in the Minutes.—Ed.

1827. April, 28. of goods consigned to them by other persons to be sold on commission. In July 1823 the ship "*Madras*" arrived at Colombo, where the greater part of the goods to be sold on commission were landed, and left in charge of Muskett and Young. Clarke and Winter proceeded to Madras and Calcutta, where they disposed of part of both consignments. The remainder was brought back to Colombo and landed there in December 1823. Part of the goods consigned by the houses in London had in the meantime been sold by Muskett and Young, as the sub-agents of Clarke and Winter. On the ship sailing to Colombo, Clarke and Winter delivered the remainder of their own investment to Muskett and Young to be disposed of in like manner, that is to say, upon commission. The goods composing the two consignments were from that time disposed of by Muskett and Young indifferently as occasion required, and no separate or distinct accounts were then, or have ever been kept of the two investments. Mr. Winter sailed in the said ship "*Madras*" from Colombo on her voyage to England about the 21st January 1824, on which occasion Muskett and Young rendered an account to Clarke and Winter of the goods then sold, in which the account sales of both investments were mixed up together, and by which a balance appeared due to Clarke and Winter of Rs. 10,554 7. 3. On the 19th February 1825, Clarke and Winter *severally* committed acts of bankruptcy; on which a commission issued, and they were both declared bankrupts on the 26th of the same month. On the 1st of July 1825, Muskett and Young at Colombo made out another account to Clarke and Winter, referring to account sales in which the goods of both investments, were, as before, mixed together: Winter had before their arrival in England sailed from Colombo, where he arrived in November 1825, and entered into partnership with Muskett and Young.

Under these circumstances, the plaintiffs contend that the property of the consignors has been so mingled with that of the bankrupts as no longer to be distinguishable, and must therefore he distributed among the general creditors of the bankrupt, and likewise the balance due on the second account.

This claim has been argued on the part of the plaintiffs, and much reliance has been placed on the case of *Scott vs. Surman* in Willes' Reports, and likewise on some other cases. The case in Willes lays down satisfactorily the six following propositions:—

1. If goods be consigned to a factor for sale, and he sell and recover the money before his bankruptcy, and do not purchase with it any specific thing capable of being distin-

guished from the rest of his property, the consignors cannot recover the whole money from his assignees, but must come in under the commission. 1827. April, 28.

2. If the factor, at the time of the sale, agree to set off a debt of his own due to the vendee, it is the same as if the factor received so much money from the vendee, and the consignors must come in under the commission.

3. But if the goods remain in specie in the factor's hands at the time of his bankruptcy, the consignors may recover the goods in time from the assignees.

4. Or if a factor sell goods for his principal and become bankrupt *before payment,* and the assignees afterwards received the money for them, the principal may recover it from them in an action for money had and received.

5. So if the factor on such a sale take notes in payment from the vendee payable to him at a future day, and his assignees afterwards receive the money due on the notes, the principal may recover it from the assignees in an action for money had and received.

6. If the assignees of a factor (bankrupt) receive bounty money on any article under an act of parliament, giving the bounty to the importer, the consignors of that article may recover such bounty money from them in an action for money had and received.

On the part of the defendants no claim to the property is made, but they contend that many of the articles of which the account is composed belonged to certain consignors in England, who entrusted the same to Clarke and Winter as factors, that the defendant held the property liable to the same trusts and for the benefit of the same persons as Clarke and Winter, and as to those items they allege that the proceeds arising from the sales of them must be paid over to the consignors, and not to the bankrupt estate.

This case, after having been brought into Court, was referred to the arbitration of Mr. Marshall and Mr. Beaufort; who, having differed in opinion, several points were referred for the decision of this Court. But as the point which is now the immediate subject of discussion, would, if ruled in favour of the plaintiff, be decisive and supersede the necessity of further argument, it has been judiciously selected as the only material point for the consideration of the Court in the present stage of the proceedings.

If the facts above cited, as alleged by the defendants be true in the whole or in any considerable proportion, and the plaintiff were to succeed to the full extent of his claim, and exclude all evidence as to the ownership of the goods, the

1827. April, 28. result would be that the goods of one man would be applied in discharge of the debt of another. I am not disposed to come to such a conclusion unless compelled to do so by the authorities, and I do not find myself in that situation at present.

The present case differs from that of *Scott vs. Surman* in the following particulars:—*First.* In the case of Scott and Surman, a balance of account appears to have been struck between the factor and the purchasers, and the debt due by the former was paid to them by way of allowance in the accounts out of the property of the principal, and notes were drawn in favour of the factor after deducting his own debt. *Secondly.* That all this took place before the date of the commission. *Thirdly.* That the factor in that case was the person employed by the owner of the goods and entrusted by him with their disposal. In the present case, no actual payment has been made to the bankrupts, nor any constructive payment, except the mere statement of an account between the factor and his agent, both of whom, it would appear, deny the accuracy of the account in its present form. And the constructive payment of the money to the bankrupt was made in this Island, before the date of the commission of bankruptcy, so far as relates to the first account. *Forthly.* The confusion of accounts in the case of Scott and Surman was made by the immediate agent of the consignors.

Now, allowing for the sake of argument, that the consignors in England were as much bound by the acts of negligence and misconduct of the defendant, as they would have been by the acts of their own immediate agents, they could not have been placed in a worse situation by the conduct of the former than by the conduct of the latter. Now, suppose the bankrupts, Clarke and Winter, had themselves stated this account in January 1824, by which their estate became considerably augmented in value at the expense of the consignors, could it be contended that such a statement would have estopped the consignors and precluded them from examining the accounts. But let us suppose further in the present case, merely for the sake of argument, that the defendants were acting in contravention of the orders of Clarke and Winter, then it would be still harder upon the consignors to consider such a transaction as conclusive against them.

The justice of the case is so evidently in the side of the consignors, that nothing but the overwhelming authority of the law, or of precedents, could induce the Court to overlook the substantial rights of the parties and prevent the introduction of evidence in support of them. And I do not find that the cases which have been decided on the subject, lead to a

different inference from that which the equity of the case requires. The case of *Garrat and Cullum* reported in Buller's *Nisi prius*, and quoted in *Willes*, resembles the present; the plaintiff in that case employed the bankrupts Burtwell and Mason to sell goods for him. They sold a parcel of those goods to a stranger. They were delivered to him as the goods of B. and M. and so charged in his account. The same goods were entered as B. and M's in their own books. Thus, as far as the accounts went, both parties entered them as the goods of B. and M. B. and M. became bankrupts before payment. The assignees received the money for the goods. But upon an action brought against them they were forced to refund 1827. April, 28.

In the case of *Favenc vs. Bennett*, 11 East 36, goods were sold by a broker for £707 10 8, and the principal was not named. The purchasers were indebted to the brokers for other goods in the amount of £272 10 4. The purchasers paid the brokers the sum of £800 in a bill, which was more than was due for each item separately, but less than the amount of them both, and the payment was made to the broker generally. Afterwards, the broker stopped payment, and it was held that the sum paid ought to be equitably apportioned between the several owners of the goods, although neither of them was named, but a general payment made. In that case the brokers dealt in their own name. Payment was made to them without any reference to particular items. Yet the persons entitled to the goods sold, were considered entitled to the proceeds. I do not refer to other cases, though a multitude is to be found in the books, in which the Courts distinctly recognize the same principles, viz. that the confusion of accounts, done without payment, or what is equivalent to payment, does not debar the rights of the true owner. From the doctrine collected in these cases, and the principles of natural justice, I think it sufficiently apparent that wherever the price of goods has not been actually paid and settled in account with the agent, and the money has been so mingled with the estate of the insolvent before the bankruptcy as not to be distinguishable, the real owner may come in and enforce his rights. I do not in this state of the case take for granted that the defendants can make a proper separation of accounts, or that Mr. Winter is or is not a competent witness.

I do not decide whether Clarke and Winter gave instruction to the defendants to keep the accounts separate; nor that the letters of the consignors are, or are not, admissible in evidence. The only point decided is that the account of the 1st July 1825, is not so conclusive in favour of the assignees, as to preclude all proofs of the claims of the consignors.

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I know not whether the plaintiffs mean to contend that the confusion of accounts in the books of Muskett and Young, and the receipt of the money by them is to be identified with the receipt of money by the bankrupts; and that the confusion of accounts in the books of the sub-agents must be identified with the confusion in the books of the bankrupts, and thus endeavour to support a constructive payment by the bankrupts, by the confusion in their sub-agent's accounts. If the arguments were pressed to this length, I should answer, first, that I see no precedent to warrant the conclusion which they would wish the Court to draw; and secondly, against the justice of the case, and the weight of legal precedents and authority, I am of opinion that no such doctrine can be maintained.

June, 28.

Present:—Ottley, J.

June, 28.

In the matter of proving the last will and testament of Haker, *deceased.*

Where the deceased gave no sufficient description, in his last will, of the person whom he wished to constitute his executor, parol evidence may be admitted to shew the person intended by the testator.

This case comes before the Court, on the application of Evert Bartholomews, for the probate of the last will and testament of the deceased. The application has been opposed by two persons, namely by the maternal aunt, and the maternal uncle of the deceased, as the next of kin, the grand mother having renounced. At the time when this case first came before the Court, several objections were urged, which have, with becoming candour and liberality, been abandoned by the Advocate of the next of kin; these were, *first*, that the executor must be defined by his name, and *secondly*, that seven witnesses are necessary to give validity to the will. These objections having been disposed of, we proceed to the most material, which is that no sufficient description has been given of the person whom the deceased wished to constitute his executor, and that, in the absence of such description, no parol evidence is admissible to show the person intended by the testator. And no person being properly named and defined, the next of kin are entitled to administration with the will annexed.

To meet the objections on the part of the next of kin, Mr. Staples has urged the authority of *Swinburne*, 904,* where the doctrine which he wishes to establish is carried to its greatest

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* *On Testaments and Last Wills.*—Ed.

extent, for the author there adduces this example: "If the testator say 'I make one man in the world my executor,' or 'I give to one man in the world an hundred pounds,' no man can be executor or receiver, unless he be able to prove that the testator's meaning was that he should be executor or have the legacy." This old author has been edited by Powell, an author of some note, and also by a modern lawyer in the year 1803, and I do not find that the position has been directly questioned by the editors. The mere silence, however, of the editors is no conclusive proof that the doctrine in its whole extent has been confirmed or even admitted by modern authorities, and the last editor has introduced two or three cases in the notes which go in some measure to qualify and restrain the principles so diffusively applied in the text. But whatever difference of opinion may exist as to the extent to which the doctrine may be carried, I consider the following proposition in Swinburne to be clearly established : "Where the testator nameth some one man his executor, or doth bequeath some legacy unto him, and there be divers men of that name, this uncertainty maketh void the disposition. For example, the testator maketh Titius his executor, whereas there be divers persons so called, or, to speak after the manner of our temporal lawyers, the testator maketh John Stile his executor, or giveth to him a hundred pounds, and there be two persons called John Stile, and the testator maketh no difference, but leaveth it uncertain of whom he did mean : in this case, neither of them can obtain executorship or legacy. But if one of them do prove that the testator did mean that he should be executor or have the legacy, it is sufficient for the obtaining of the executorship or legacy." This doctrine is fully confirmed by Lord Bacon in his 25th maxim, where the law on this subject is fundamentally discussed ; "Infinite cases of this *ambiguitas patens* might be put, for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election ,but never by averment, but rather shall make the deed void for uncertainty. But if it be *ambiguitas latens*, then otherwise it is, as if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all, but if the truth be that I have manors both of south S. and north S., this is matter in fact, and therefore shall be holpen by averment whether of them was that the party intended should pass. As if I give lands to Christ Church in Oxford and the name of the corporation is Ecclesia Christi in universitate Oxford, this shall be holpen by averment, because there appears no ambiguity in the words, for this variance is matter in fact, but the averment shall not

1827. June, 28. be of intention, because it doth stand with the words. For in the case of equivocation, the general intent includes both the special, and therefore stands with the words, but so it is not in variance, and therefore the averment must be of matter that do endure quantity and not intention." *

But the doctrine is carried much further in some cases, for the Courts will charge the persons named, and if one person be named and the description of him fail, parol evidence will be admitted to prove that a person of different name is intended, *Thomas vs. Thomas,* 6 T. R. 671, and the cases mentioned in 8 *Viner's Abridg.* 310—12 etc.

So when two children bear the same name, parol evidence is admitted to prove which was intended. This is in truth a case of *ambiguitas latens*, where every thing appears plain in the will, but it appears that more persons may be denominated chief securities than the persons heie intended : we then recur to the cases where two persons bear the same name, as in 8 Viner, 310. A. hath issue two sons both named John: in this case, parol evidence was admitted. So where a legacy was left to all and every the hospitals, it appearing that the testatrix lived in Canterbury for many years and other circumstances, this request was holden not to be void, but to have been intended for all the hospitals in Canterbury, *Masters vs. Masters,* 1. P.W. 425.

And it is generally admitted that Courts of law as well as Courts of equity will admit parol evidence of the situation and circumstances of the party, for the purpose of assisting them in putting a construction on wills that are not clearly expressed, Phillips *On Evidence*, 574. Many more authorities might be adduced, but I consider them as unnecessary. I have begun with Lord Bacon, I have referred to the old authorities in Viner, I have traced them through Swinburne, P. Williams, the Term Reports, and Phillips.

The only answer that can be given to these cases is that there a person is named, but I do not think this makes any difference. If a person be mentioned by the name of his office, that will be sufficient, as a legacy to the bishop, arch-bishop, &c., and this is more peculiarly the case in Ceylon, because the natives are accustomed in almost all instances to describe persons by their office, and not by their names.

I think, therefore, that evidence may be admitted of the person intended by the testator to be executor.—(Per *The Supreme Court of Judicature.*)

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* See Bacon's *Law Tracts.* pp. 99,100.—Ed.

At *Colombo*, in the Island of Ceylon, the *ninth day of October* 1827: 1827. October, 9.

On which day, pursuant to the directions for that purpose contained in the 76th section of his Majesty's Royal Charter or Letters Patent, bearing date in Westminster the 18th day of April 1802, in the forty first year of His late Majesty's Reign, the Hon'ble Sir RICHARD OTTLEY, Knight, Puisne Justice of the Supreme Court of Judicature in the Island of Ceylon, having succeeded, pursuant to the 86th section of His Majesty's said Charter, to the Office of Chief Justice of the said Supreme Court of Judicature, in consequence of the death of the Honorable Sir HARDINGE GIFFARD, Knight, L L. D., late Chief Justice of the said Supreme Court; and the Honorable HENRY MATTHEWS, Esquire, being appointed by His Excellency the Governor to execute the Office of Puisne Justice of the Supreme Court of Judicature in the Island of Ceylon, pursuant to the said 86th section of His Majesty's said Royal Charter: did severally proceed to the King's House of the said Presidency, and there take the oaths in the most solemn manner that they would, to the best of their knowledge, skill and judgment, duly and justly execute the office of Chief Justice and Puisne Justice of the said Supreme Court of Judicature and impartially administer justice in every cause, matter and thing, which should come before them; and did also take the Oaths of Allegiance and Supremacy, and take and subscribe the declaration against Transubstantiation, in such manner and form as the same are by law appointed to be taken or made in Great Britain: which oaths were administered by and before the Honorable Sir EDWARD BARNES, Knight, Commander of the Most Honorable Military order of the Bath, Governor of His Majesty's Settlements in the Island of Ceylon and the Territories and dependencies thereof, according to the directions and provisions contained for that purpose in the said Charter or Letters Patent.

Sir Richard Ottley, sworn in as Chief Justice, and Mr. Matthews as Puisne Justice.

October, 25.

Present:—OTTLEY, C. J. AND MATTHEWS, J.

October, 25.

Arcotty vs. Esoop Baboo et al.

In this case the plaintiff filed his bill on the equitable side of this Court on the 13th of August 1827 for the purpose of restraining the defendants from fraudulently removing the

Where plaintiff obtained two judgments against 1st de-

1827. October, 25.

fendant, whose counter claim was dismissed, and the 1st defendant appealed and, pending appeal, confessed judgment to his son, the 2nd defendant, in a case instituted by him, so that execution issued and plaintiff was sought to be deprived of the fruits of his two judgments. *Held* that plaintiff was entitled to an injunction to restrain both defendants from intermeddling with the property seized, and that his application for a receiver should be allowed.

property of the first defendant, Mahomed Casim Esoop Baboo, seized under the execution issued upon a judgment said to be fraudulently confessed by the said first defendant in favour of the second defendant his father.

The history of the transactions which led to these grieveances is given in the former part of this bill, by which it appears, that the first defendant was indebted to the plaintiff a on bond in a considerable sum of money; that he gave bills of exchange in payment of the bonds which were protested; that in consequence, the plaintiff put his securities in suit against the first defendant in the Provincial Court, and obtained judgments against him, one in May 1825, the other in May 1827; that the first defendant about the 14th April 1825, commenced a suit against the plaintiff for six thousand four hundred and fifteen Rixdollars, which suit was dismissed; that petitions of appeal have been filed against each of the judgments obtained in favour of the plaintiff; that such judgments, remaining in full force against the first defendant, excepting in as much as the power of suing out execution, were suspended by the appeals; that the second defendant filed a libel against the first defendant in the Supreme Court; that the first defendant appeared at the citation, and confessed judgment immediately; that execution was taken out upon such judgment by the second defendant and certain property sold, which was purchased by the second defendant, the plaintiff in that suit; that an application was made to the judge for leave to be allowed to take the property, so purchased, without paying the money; that such applications having been refused, further proceedings upon the execution were abandoned.

Upon these proceedings having taken place, the plaintiff applied for an injuction to restrain the defendants from intermeddling with the property, and for a receiver, which having been granted, the answer in due course was exhibited, and a motion made to dissolve the injunction.

The question now before the Court is, whether enough appears upon the answer to warrant the Court in removing the restraint which has been imposed upon the defendants, and to allow them to get possession of the property in dispute.

Now, the first observation, I have to make on these proceedings is, that if the bill be substantially true, a more flagrant and impudent fraud has been seldom practised; and more especially under color of the process of courts of justice.

The validity of the plaintiff's claim upon the first defendant is disputed; for although the first defendant confesses that he gave a bond for 3,700 rupees to the plaintiff, he swears that he received no consideration. But what is the next averment

in the plaintiff's bill admitted by the answer ? It is this, that in payment of a bond, for which first defendant alleges that he received no consideration, he gave a bill of exchange for 700 rupees on the 4th August and 3000 rupees by three equal instalments. As the defendants had an opportunity of urging all these matters before the Provincial Court and judgment has been given against them, I must presume, at least for the purposes of this argument, that a defence, supported by assertions so extremely imputable, was not made out, and that at least a prima facie case was proved by the plaintiff in the Provincial Court ; but the case on the part of the plaintiff does not rest here, for we find the first defendant bringing an action against the plaintiff in the Provincial Court, in which he failed, a still further proof of the weekness of that defendant's claims.

The case then stands thus : two judgments are obtained against the first defendant for a large sum of money and his counter claim is dismissed. The power rendering these judgments available is taken away for the moment. Then comes the second defendant, father to the first, and institutes an action in this Court. Without loss of time judgment is confessed and execution issued; by this judgment and execution, the plaintiff is deprived of the fruits of his two judgments, which have been pronounced after a hearing in Court.

Now, the first thing that strikes upon our attention is the near relation between the parties, father and son. The second, is the tying up of the two cases by appeal. The third the rapidity of the movements of the first and second defendants in their proceedings in this Court. I will not go the length of pronouncing that the judgments confessed was fraudulent, because that would be to prejudge the case. Nor will I say that the decision of the Provincial Court is certainly unexceptionable, as it is now to be reviewed ; but I must say that when I consider the relation of the parties, defendants, father and son, the prima facie title of the plaintiff, and the suspicion thrown upon the proceedings of the civil suit in this Court, there is quite enough to call upon the Court to protect the property in litigation until it shall appear who is entitled to it.

Under these circumstances the injunction and the receiver must be continued until further order.—(Per *The Supreme Court of Judicature*).

1827.
November, 7.

November, 7.

Present:—Ottley, C. J. and Matthews, J.

Levvai Kando Natchia vs. Anisa Marikar.

(4,958.)

Jurisdiction of the Supreme Court of Judicature.

This suit is instituted by the plaintiff against the defendant as a native, who is stated in the libel to be now residing in the Pettah within the *Kayman's Gate.* To this libel, a plea is put in by the defendant, alleging that he was not at the institution of this suit, nor has he been since, residing or domiciled in the Pettah within the *Kayman's Gate*, and therefore, according to the Charter, that he is not liable to the civil jurisdiction of this Court.

The plaintiff demurs *ore tenus* to this plea and the question, for the Court therefore to determine is, whether a native, not residing or domiciled within the Kayman's Gate, is liable to the civil jurisdiction of this Court. It is true that the defendant's plea states that even if he were resident within the Kayman's Gate, this Court will have no civil jurisdiction over him ; but they seem to have been added for the sake of precaution, that is to say, to protest against the decision being conclusive against him, if in point of fact, his residence within the Kayman's Gate should be established.

In order to bring that question regularly before the Court, the defendant must reply to the plea, and if the fact can be established that the defendant was domiciled in the Pettah within the Kayman's Gate, the parties will then be at issue on the point of law, whether such a defendant being a native, is liable to the civil jurisdiction of this Court, which question may then be fully argued, and the Court will then decide upon it.

As to the present question, it appears to us to be too plain for argument ; and it has been indeed again and again decided.

Whatever opinion may be entertained as to the effect of such decisions upon the question of the jurisdiction of this Court over natives domiciled within the Kayman's Gate, (upon which point, as it seems that it is now about to be contested, we pronounce no opinion), there can be no doubt that they are quite conclusive against the civil jurisdiction of this Court over any native domiciled within the limits of the Pettah. And so completely settled has this been considered, that it is

has become the established practice to state in the libel when the defendant is a native, that he resides within the Kayman's Gate.

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It is admitted by the argument put in by the Proctor for the defendant that, at the time of the promulgation of the Charter, the Land Raad had a concurrent civil jurisdiction with the Civil Court, without the Pettah and within the Gravets.

This being so, it is quite clear that the operation of the 31st clause of the Charter is to take away the civil jurisdiction from this Court in all cases in which the Land Raad had then any jurisdiction, either concurrent or otherwise.

The judgment of the Court is therefore that the plea be allowed, with liberty, however, to the defendant to reply to it, for the purpose of proving the residence of the defendant in the Pettah, within the Kayman's Gate, as stated in the libel.—(Per *The Supreme Court of Judicature.*)

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*Mathes Pulle, vs. Rodrigo.**

(4,923.)

Jurisdiction of the Supreme Court of Judicature.

This case stands before the Court for decision on a plea to the jurisdiction, in the first instance; and secondly, supposing the Court to have jurisdiction over the person, then the plea goes on to state that the suit now brought by the complainant is competent to be tried and determined by the Provincial Court.

Little doubt, can, I think, be entertained as to the first part of the plea. The Charter is, I think, not only sufficiently clear and intellegible, but that no other construction can possibly be put upon it, than that which it has already received by this Court.

The 29th clause of the Charter gives the Court jurisdiction over all civil cases, actions, suits and matters, which shall arise, happen or be brought or promoted within the fort, town, and district of Colombo upon any civil injury, or any debts, duties, demands or interest *in rem*, or any concerns of what nature or kind soever, or any right, titles, claims or demands of, in or to any lands, houses or other property, within the said

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* There is no date to this judgment. I print it in the order it stands in the Minutes, though the mention of Mr. Matthews' name, as advocate for the defendant, shews that the judgment in question must have been delivered some time before that gentleman mounted the bench as Puisne Judge, which was on the 7th October 1827, according to the entry in p. 115.—Ed.

1827. fort, and to try the same with their incidents emergent, and thus, as ample a jurisdiction, with respect to the subjects which can come within the consideration of a Court of law, is given as words can well convey.

The 30th clause goes on to convey a jurisdiction over all and singular the inhabitants of the town, fort and district of Colombo, and over all persons commorant and being within the same at the time such action shall be commenced although not domiciled.

Then comes the 31st clause, which limits the jurisdiction to a certain extent; we must look into the words to see how far that jurisdiction is restrained. The words are as clear and intelligible as language can afford: they are as follows:—

"Nothing herein before contained shall extend or be construed to extend to any causes, suits, actions, matters and things, between the natives of the said Island of Ceylon or India, or wherein there shall be a native defendant, which are now competent to be tried and determined in the Provincial Court."

Now the jurisdiction of the Court is plainly limited even in civil cases, to such causes, suits, actions, matters, and things between natives of Ceylon or India, or when there is a native defendant as were competent to be tried by the Provincial Court. The limitation of the jurisdiction is expressly confined to those cases between natives, or where there is a native defendant which are cognisable by the Court of Land Raad.

The two following clauses provide for the succession and rights of inheritance and the rules of proceeding relative to natives.

No further jurisdiction is conferred upon this Court, until the 39th clause, whereby an equitable jurisdiction is granted in these words. "We do hereby grant, ordain and establish that the said Supreme Court shall also be a Court of equity and shall and may have full power and authority to administer justice in a summary manner according to the law now established in the said settlements in the Island of Ceylon, and in point of form, as nearly as may be, according to the rules and proceedings of the High Court of Chancery in Great Britain." Now from this clause it appears clearly that a new and additional jurisdiction is intended to be granted to the Court: a jurisdiction unknown to the Dutch Law and a jurisdiction not proceeding according to the forms established in the Dutch Courts, but introducing a novel and most beneficial system of redress to all the inhabitants within the jurisdiction of the Court. The rule of the Court is prescribed, namely, the law as established in these settlements; but the mode of

administrating that law varying extremely from any practice antecedently recognized by the codes then existing, the framers of the Charter cannot be supposed to be ignorant of the alterations they were here introducing. The former clauses of the Charter prescribe a mode of proceeding consonant with the practice of the Dutch Law; but this clause, guarding the rights and property of the inhabitants, prescribes a mode of protecting and enforcing these rights wholly unknown to former codes. The 39th clause is drawn in a style so comprehensive as to include all the inhabitants within these settlements; but as no intention existed of extending the civil or equitable jurisdiction beyond the limits of Colombo, a proviso is added in the 40th clause, whereby the very general expressions of the 39th clause are limited and restrained, and the equitable jurisdiction thereby given is defined to extend over such limits, district and persons only as is, and are therein before, declared and directed to be subjected to the Supreme Court in the exercise of its ordinary jurisdiction. It is clear that the Provincial Court has no authority to entertain suits in equity by way of bill and answer, according to the practice of the High Court of Chancery in Great Britain, because it is wholly unknown to Roman Dutch Law. And so far from thinking that addition of the words, "suits, actions, matters, and things" would have rendered the sense more perspicuous, I think that it would have tended to introduce confusion; for how would the clause then have stood? It would have been thus. "The equitable jurisdiction hereby given to the said Court shall extend over such limit, district, persons, actions, suits, matters and things as is and are herein before declared and directed to be subject to the said Supreme Court in the exercise of its ordinary civil jurisdiction." If these words had been inserted, an argument might fairly have been raised that the equitable jurisdiction was only to extend over the same things as were included in the civil jurisdiction; that the civil jurisdiction was restrained to the cases not included within the range of the Provincial Court, and therefore that the Court had no jurisdiction wherever a suit for ther ecovery of the same species of property might be maintained in the Provincial Court, however defective the remedy, and however inadequate were its powers, to do complete justice to the suitors. And thus the clause would have been rendered nugatory, or worse than nugatory; for, suppose (as was really the case) the Provincial Court should have been suppressed for any period: during the whole of that time, the equitable jurisdiction of this Court would have been in exercise, but as soon as the Provincial Court revived, that more beneficial and efficacious system introduced for the distribution of justice 1827.

1827. would expire ; and so far a failure of justice would ensue.

But the intention of the Charter is plain ; it did not mean to restrain the Court as to any suits, actions, matters and things before mentioned, because those were applicable to other purposes, and the suits now in contemplation were a novel, auxiliary and additional remedy for the exhibition of justice hitherto unknown in Ceylon.

But let us now refer to the very next clause, the 41st, and consider the jurisdiction there conferred : that jurisdiction extends over lunatics and idiots, and the words are, " we do hereby (subject to the provision and restriction last mentioned) authorize the said Supreme Court, to appoint guardians and keepers for infants and their estates, according to the order and course observed in that part of our United Kigdom called England."

Now, this clause plainly confers a jurisdiction over all infants, lunatics and idiots, and is co-extensive with the jurisdiction conferred in the 29th clause, as to district and persons, and if the Court were limited in the equitable jurisdiction, and restrained in the exercise of its powers in equity to the matters and things alone within its civil jurisdiction, then would it be also restrained in this clause, and the clause be rendered a nullity. These two clauses, the 29th and the 41st, both confer new and important powers upon the Court.

Difficulties attendant on the exercise of the equitable jurisdiction of the Supreme Court.

We now come to the second part of the plea, which in effect amounts to a demurrer for want of equity, and must confess that the greatest difficulties which a judge has to encounter arise in the consideration of this part of our jurisdiction. He is called upon to administer a system of equitable jurisprudence, in analogy to the forms and proceedings of the Court of Chancery in England, and to apply that system to a collection of laws totally different from that over which the jurisdiction of the Court of Chancery is exercised. He is called upon to adopt maxims, rules, and forms of proceeding, in reference to a subject untouched by the chancellors themselves, and thus he is deprived of very many of the advantages resulting from a series of luminous and scientific decisions, moulded at length into a system of judicature, the product of the accumulated wisdom of centuries, now established upon basis so secure, and principles so acknowledged, that the adventurous spirit who should attempt to depart from the decisons of his predecessors, would be considered as violating the fundamental laws of his country. Many of those decisions are undoubtedly applicable to the state of this country, and the spirit of equity which pervades them all ought to be the guide of this Court.

1827.

But in adapting the principles of the Court of Chancery to the objects of consideration in this Court, we require much more prudence and circumspection than is demanded by those who are living under the constitution, and are conversant with the state of things, from whence these principles originated. We are here compelled to administer the rules of the Court of Chancery in a country where the laws in many cases run parallel with those rules. The Court of Chancery took its origin in a great part from the maxims of the Civil Law, which may indeed be said to have given birth to that Court. What interpretation must be put upon the law, which says that the forms of the Court of Chancery must be observed, but the law administered according to the law now established in the said settlements in the Island of Ceylon? It must mean that the rules and practice of the Court of Chancery, are to be applied to the law established in this country in the same way that the rules of the Court of Chancery in England are applied to the laws of England. The limitation of our power to afford relief in equity may be illustrated by the case *Sela vs. Bayer* lately decided in this Court, and I rely more upon that case, because it was not a decision of my own merely, but was sanctioned by the authority of a case in the Exchequer, reported by Anstruther. In that case, the English rule of equity was held not to prevail in this Island, because found inapplicable to the system of jurisprudence here established; in the same manner as the Court of Exchequer found itself unable to afford relief in England, because the laws of Prussia rendered the exhibition of such relief impossible.*

The Supreme Court affords relief, under its equitable jurisdiction, (1) by enforcing the principles upon which the

Here therefore I must take my stand, and lay it down as a principle of the equitable jurisdiction of this Court, that we afford relief, and provide a remedy, by enforcing the principles upon which the ordinary Courts also decide, when the powers of those Courts, or their modes of proceeding, are insufficient for the purpose; *secondly*, by preventing those principles, when enforced by the ordinary Courts, from becoming instruments of

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* The case in question appears to be *Sawer vs. Shute*, 1 Anst. 63: where a wife, resident in Prussia, was entitled to a share under the distributions of an intestate's effects, and her husband came into the Court of Exchequer to obtain the money found to be due, the Court considered whether it should order the money recovered to be settled on the wife or paid to her husband, and on finding that, by the laws of Prussia, the whole personalty of the husband and wife was, during the coverture, at the absolute disposal of the husband, but on the death of either, was divided between the survivor and the heirs of the deceased, the Court ordered the money to be paid to the husband, it being observed that it would be very difficult to direct any way by which it could be so settled, so as not to be liable to be done away by the laws of Prussia.—Ed

1827. injustice; *thirdly*, by deciding on principles of universal justice, when the interference of a Court of judicature is necessary and the positive law is silent; and in practice we must apply those remedies as extensively as the Courts of equity in England, whenever the modes of proceeding in the ordinary Courts are insufficient; and I consider that, when the Charter says in the 39th clause that this Court shall administer justice in a summary manner, according to the law now established in these settlements, and in point of form, as nearly as may be, according to the rules and proceedings of this High Court of Chancery in Great Britain, we must apply the rules and proceedings of that Court to the law now established in Ceylon in the same manner, and under the same modifications, and upon the same principles, as those upon which the Chancellor would administer the rules and proceedings of the Court of Chancery in Great Britain, according to the laws now established in England; and this interpretation of the Charter is warranted by the Madras Charter, where the words, although different, appear to embrace the same objects, (see the clause in the Madras Charter, p. 67—68.)

ordinary Courts also decide, when the powers of those Courts are insufficient for the purpose; (2) by preventing those principles, when enforced by the ordinary Courts, from becoming instruments of injustice; (3) by deciding on principles of universal justice, when the interference of a Court is necessary and the positive law is silent.

The words of the Madras Charter are "upon a bill filed to issue subpœnas and other process under the seal of the said Court, to compel the appearance, and answer upon oath, of the parties therein complained of, and obedience to the orders of the said Court of equity, in such manner and form and to such effect as our High Chancellor of Great Britain doth, or lawfully may, under our great seal of Great Britain, or as near the same as the circumstances and condition of the places and persons under the jurisdiction and the laws, manners, customs, and usages of the native inhabitants will permit."

This mode of considering the Charter may perhaps very materially affect the decision of those cases which pray for relief, as well as discovery, and in the particular case now before the Court, I have no hesitation in stating that one of the objects of the bill may possibly be attained in the Provincial Court: I mean the taking of the account between partners, unless the answer of the defendant be necessary to establish the account. Mr. Matthews for the defendant, in the course of his argument, has shown satisfactorily that, according to the law of England, an action of account will lie between partners; and indeed when we consider the nature of that action, the equity of it clearly seems to include an account between partners, although in the case of real property, a statute appears to have been thought necessary to enable joint tenants and tenants in common to maintain the action. The doctrine of the law of actions between partners, according to the Roman

Dutch Code, is laid down by Voet, with his characteristic clearness and precision, in bk. 3 chap. 17, where the distinction between action *de communi dividendo* or division of the joint property, and an account &c., and the action *pro socio* which the one partner can maintain without a dissolution of the partnership, is drawn. Voet, indeed, expressly states that nothing prevents the action being maintained, as well when the partners are engaged in contracts with the Government, as in a merely private partnership. 1827.

I do not find anything about this form of action in Grotius; but the several obligations of partners are stated in the same manner by each of those celebrated writers, and Voet is quoted in the notes of the Editor of Grotius.

I am therefore of opinion that no doubt can be entertained that an action *pro socio*, which includes the action of account, may be maintained in the Provincial Court, but if the account cannot be proved without the answer of the defendant, the plaintiff may proceed in this Court; and for the purpose of avoiding multiplicity of suits, this Court would entertain jurisdiction, for the purposes of relief also.

But many of the objects of this bill are peculiarly within the province of the Court of Chancery: first the plaintiff seeks to establish an agreement; secondly, he seeks for an injunction; thirdly, he seeks evidence to prove part performance of that agreement, and an account of the rents and profits received by the defendants; lastly, the plaintiff seeks to have the agreement specifically enforced, and to be exonerated from the incumbrance on his property as security for the plaintiff, the consideration, for which he became security and encumbered his property, having been fraudulently withholden by the defendant.

I am therefore of opinion that the defendant's plea must be over-ruled.

There is one point which, whenever it arises, shall get further consideration from me. It is this: Suppose the plaintiff came into the Court to obtain an account, and a decree that the balance shall be paid to him and for no other object: the question would then be, whether, after the defendant has answered upon oath and the account taken, the plaintiff must be driven into the Provincial Court to carry on the subsequent proceedings, or whether this Court ought not to give relief and enforce payment of the account. Upon this point I do not undertake to decide definitively, but my present opinion, as before expressed, is in favour of such a jurisdiction.—(Per *The Supreme Court of Judicature.*)

1827.
November, 14.

November, 14.

Present:—Ottley, C. J. and Matthews, J.

Garstin vs. Winter.

Action for money received.

This action was instituted for the recovery of the principal sum of fifty pounds and interest, which principal sum was paid by the plaintiff to the defendant for a letter of credit, written on the month of February 1826, in favour of the plaintiff's wife, then intending to proceed on her passage to the Cape of Good Hope, to Mr. Pence, a merchant, residing at that place. The plaintiff's wife died at the Mauritius before she reached the place of distination, and the letter of credit was never used by her. This letter of credit came into the hands of the Rev. R. E. Jones of the Mauritius, and he says that it had not been signed and that he transmitted it to the address of the plaintiff, via Pondicherry, but it never reached the plaintiff. Under these circumstances, and the defendant being about to leave Ceylon, a motion was made to arrest him.

The Court, as then constituted, having taken the case into consideration, did not feel authorized to issue the warrant of arrest, until security had been given to indemnify the defendant against all damages, which might arise to him on the said letter of credit.

The enforcing of this security may seem unusual. The case was certainly novel in its circumstances, and after this lapse of time, I feel satisfied that the warrant of arrest ought not to have been issued without security.

Letter of credit, its nature.

The principal difficulty in this case is to determine what sort of instrument this letter of credit was. Now, a letter of credit in general appears to be " a letter written by a merchant to his correspondent, empowering a person named to receive from the correspondent a sum of money specified." It may be either transferable or not. If it be not a transferable and negotiable instrument, the plaintiff's case will be encumbered with few difficulties. If it be a negotiable instrument, then the question is, what is necessary to render it available in the hands of a second holder. This must be the signature at least of the person in whose favour it is drawn, or an order from that person to pay the contents, or some portion of the contents to another. The value even of a bill of exchange, when specially endorsed, may be recovered, if lost, before it is again rendered negotiable by the signature of the special indorsee, and Mr. Jones' testimony is decisive upon this point, for he expressly states that the letter of credit was not signed.

The defendant alleges in his libel of reconvention that he has paid 133 Spanish dollars, equal to £28 16 4, for the use of the plaintiff. But by whom was this money paid? Not by Mr. Pence, the correspondent of the defendant, but by Captain Hoyes, and the only evidence of this payment is a letter from Mr. Pence respecting a conversation with Captain Hoyes. This surely is not admissible evidence ; but if it were admissible, then the conversation between Mr. Jones and Captain Hoyes seems to contradict it. Had Captain Hoyes been proved to have paid the sum stated, out of the defendant's money, for the use of the plaintiff, the case might have assumed a different complexion. A commission is gone to England to examine Captain Hoyes, and when his answers are received, the whole case will come regularly before the Court. But that will be quite a bad case, and very remotely connected, if it can be said to be at all connected, with the letter of credit. 1827. November, 14.

The sum of £50 appears to have been paid by the plaintiff to the defendant for a letter of credit. What is become of that letter of credit ? The evidence of the identity of the letter of credit was so defective, at the time when the evidence was closed on the part of the plaintiff, that the Court thought the oath of Mr. Garstin necessary, in order to complete the proof. He having been called on, swears that Mrs. Garstin took no other letters of credit than that from Winter ; that he must have known it had she any more letters of credit, that Winter signed it himself, and he believes it was signed by Winter alone, and not by him in the name of Winter and company.

Under these circumstances, we are satisfied of the identity of the letters of credit and thereupon give judgment for the plaintiff, for the amount of £50, but without interest, and we do not feel warranted in awarding judgment for costs, because we do not think that any delay was occasioned by the defendant. The plaintiff could not claim from him any return of money antecedent to the giving of security for the repayment in case the letter of credit should be put into circulation, and until such security were given no right of recovery vested in the plaintiff.

Security to be given before money is taken out :—(Per *The Supreme Court of Judicature*).

1828.

*Moir vs. Garstin.**

In the absence of an agreement, or statutory provision, or local custom, tax is payable by the tenant.

This case comes before the Court for decision with very little to direct the opinion of the judge.

It appears the defendant agreed to pay a certain rent to plaintiff. During the time the defendant occupied, he paid the house tax, and desires to set off so much as he paid on that account against the claim of the plaintiff. Considering how very silent the regulation has been in fixing the proper person to bear the burthen of the house tax, the Court was curious to ascertain the custom of the country on the subject. But the practice seems to vary so much on the point in question that no sufficient data have been afforded by the evidence adduced.

Under these circumstances I am of opinion that the tenant must pay the tax, in conformity to the practice which prevails in England, in those cases wherein no specific agreement has been made.

But no cost on either side.—(Per *The Supreme Court of Judicature.*)

Selman Appoo, vs. Hopman.†

Joint will, its effects.

This case comes before the Court on a plea by the defendant to save property from an execution issued out of this Court *de bonis propriis* on the suggestion of a devastavit. She pleads that the property is secured to herself and her children by a deed of entail, called a fidei commissum. The Dutch Law on the subject of fidei commissum between husband and wife, in those cases wherein they jointly execute a will disposing of the joint property, has been variously interpreted ; and I find that so reputable an author as Grotius, in his *Inleiding*, bk. 2. ch. 15. §. 9, has stated the law erroneously. He has however been corrected by Voet and Van Leeuwen in his *Censura Forensis*, in which latter authority, the distinction is precisely drawn, where the joint will binds the survivor, and where the survivor is at liberty to make a distribution of the property contrary to the terms of the will. It appears in the *Censura*

* There is no date to this judgment. I print it in the order it stands in the Minutes.—Ed.

† No date to this judgment also.—Ed.

Forensis pt. i. bk: 3. ch. 11. §. 7, that the survivor is bound by the joint will only in one case, namely, the case in which one of the persons named, with the consent of the other, or both with reciprocal consent, makes the other named person heir of the estate, by way of fidei commissum, substitution, or usufruct. In this case, as each partner is benefited by the will thus made, it would be very unjust that the survivor should have the power of depriving the persons entitled in remainder of that advantage for which the testator has paid a sufficient consideration. 1828.

In this case, however, the survivor does not come under either form, or the spirit of the law. She would be at liberty to frustrate the intention of the testator, and her creditors have a right to the same benefit to which she is herself entitled.

Therefore this execution must be against the moiety of the joint profits. Moiety of each house to be sold.—(Per *The Supreme Court of Judicature*).

June, 14.

June, 14.

Present:—The Hon. Sir RICHARD OTTLEY, Knight, C. J.

Mr. Marshall sworn in as Puisne Justice.

The Honorable CHARLES MARSHALL, Esquire, produces in Court a warrant under the hand and seal of His Excellency Lieutenant-General, Sir EDWARD BARNES, Knight Commander of the Most Honorable Military Order of the Bath, Governor and Commander in Chief of the Island in Ceylon, bearing date this 14th day of June, appointing him Puisne Justice of the Supreme Court of Judicature in the Island of Ceylon, vacant by the death of the Hon'ble HENRY MATTHEWS, Esquire, late Puisne Justice of the said Supreme Court.

The said warrant is read and filed.

The said Honorable CHARLES MARSHALL, Esquire, did afterwards take the Oath of Office, and the Oaths of Allegiance, Supremacy and Abjuration, which were administered to him by the Honorable the Chief Justice, and he also made the declaration against Transubstantiation, in open Court, and took his seat on the Bench.

1828. July, 21.

July, 21.

Present:—Ottley, C. J. and Marshall, J.

Anthony Fernando, vs. Layard.

No. 4,939.

In an action for false imprisonment, the damages accruing from the illegality of the act complained of, may be mitigated and even rendered nominal, by the malice of the plaintiff and the perjury of his witnesses.

This is an action brought by the plaintiff, who was keeper of an arrack tavern against Mr. Layard, the defendant, who was at the time the cause of action arose, Collector of Colombo and a Magistrate. The action is for false imprisonment and flogging. As however, the fine for non-payment, of which the imprisonment was awarded, has been determined not to have been illegally imposed, it will be unnecessary to touch on that part of the transactions except very slightly.

The other part of the defendant's conduct, namely, the infliction of corporal punishment, is that which appears to have given rise to the proceedings in this Court; although the false imprisonment has been also charged as a ground for recovery of damages.

The proceedings of the defendant were brought to the notice of the late Mr. Matthews who was then Advocate Fiscal, I believe, by a petition, presented directly to Mr. Matthews or to the Chief Justice, Sir Hardinge Giffard, and referred to Mr. Matthews. I find however a petition to the Chief Justice, dated 23rd October 1826, and that a motion was made by the Advocate Fiscal for a *certiorari* on the 25th of October 1826, two days after the date of the petition. Upon the proceedings having been brought up under the *certiorari*, it appeared that the plaintiff in this suit had been accused before Mr. Layard, "of having in his possession arrack for retail, which was not got from our godowns (meaning I conclude, from the Government godowns), in contravention of the 8th article of the conditions." The case against the plaintiff was proved to the satisfaction of Mr, Layard, and three witnesses were called to prove the seizure of the arrack in question : and he tried the strength of the arrack by the hydrometer. The liquor seized varied considerably in strength from the genuine arrack sold at the Government store, and varied also in color.

The plaintiff having been called upon for his defence said that the Mohandiram came to his tavern, seized the bottle and immediately put something into it to discolor it. He brought four witnesses to prove this. He adduced one witness, who was examined, and swore that the Mohandiram, who was the

witness against the plaintiff, got down from the bullock bandy and put something into the bottle he seized. The plaintiff was not allowed to call any more witnesses in his defence, and the Court declined, as was stated by the defendant, calling more of these witnesses, which (as he thought) could only tend to the encouragement of the crime of perjury, and that the defence of the plaintiff was the most barefaced accusation against a headman in the discharge of his duty. And then the defendant proceeded to say that, although it were possible the Mohandiram could have colored the arrack, it was by no means so that he could have altered its strength by so doing, and proceeded to prove the spirit by the hydrometer. 1828. July, 21.

It is not my business to discuss points of natural philosophy in this Court, unless they are peculiarly brought to our notice; but I confess that the impossibility of the strength of the arrack being changed does not appear very clear to my mind. On the contrary, if the quantity of liquor infused into the bottle were considerable, I should be inclined to think that the strength of the liquor might be varied, and varied in proportion to the magnitude of the body of the liquor of a higher proof which was poured into the bottle seized, and that therefore the defence of the plaintiff was not altogether inconsistent with the result of the experiment made on the liquor. I do not mean however to say that I disagree with the defendant in the conclusion which he has formed on the whole of the evidence, as far as it appears to have been received. The defence set up might have been false, and I suppose was false, and that the defendant, whether acting as Collector or Magistrate, was warranted in disbelieving the defence set up by the plaintiff. Acting upon this conviction, the defendant ordered the now plaintiff to pay a fine: so far the proceedings (although, in my opinion, irregular, in stopping the accused before his defence was concluded), were not impeached by the Advocate Fiscal. But the defendant further went on to punish the plaintiff with twelve lashes for this false accusation against a headman in the discharge of his duty and attempting to support it by false witnesses. This latter part of the sentence was quashed, it appearing on the face of the proceedings that the plaintiff was so punished for the nature of his defence: a conclusion which in my opinion, has not been shaken by anything adduced in evidence.

After this order for quashing part of the sentence had been made, the plaintiff brought his action *in forma pauperis;* the defendant put in a plea, which was over-ruled, and need not therefore now be discussed. A subsequent plea or rather

1828. July, 21. answer was then put in, whereby the defendant denied that he acted as Justice of the Peace, and he attempts to defend the flogging by stating that he felt convinced that he, as Collector, was justified in pronouncing this sentence in point of law, as far as immemorial usage, founded on the absolute necessity of preserving due subordination among the natives, can establish a law, and that he is ready to give the most satisfactory evidence of such usage.

The case, as far as relates to the flogging, was admitted and proved by the diary of the defendant, containing instructions to the Dissave in the Dutch time, and Mr. Reikerman was called to substantiate the practice in the Dutch time. The paper contains these words following :—

Art. 27. "Within the whole district of Colombo, as here above described, the Dissave has authority only to prosecute, seize and deliver over to the independent Fiscal at this place, all robbers, murderers, and other malefactors; but petty crimes, especially neglect or abuses or other faults, he shall cause to be corrected by fines, or by flogging with the rattan or whip, also by putting in chains, but in the last case he is in every instance to make report thereof to the Governor."

Upon reading these Instructions, I am decidedly of opinion that they contain nothing (even allowing that they continued to be the law to this day) which justifies any man, whether a Collector or a Magistrate, in stopping a person accused and ordering him out to be flogged, before his defence is concluded: but that he is entitled to make his defence, and before any punishment is awarded against him, he ought to be charged with some specific offence and allowed to call his witnesses, and to meet the charge brought against him.

But the plaintiff has acted before this Court in a manner which sufficiently proves how little worthy he is of recovering anything more than nominal damages from the defendant. The plaintiff has endeavoured to show that the defendant was acted by a vindictive and malicious feeling against him. In a most barefaced manner he has called witnesses, to prove that the Cangany of the Cutchery told the defendant, before he ordered the plaintiff to be flogged, that the plaintiff had presented a petition against him, and that almost immediately as the defendant heard that, he ordered him out to be flogged. The petition, alluded to and presented in the month of April 1826, does not appear ever to have gotten out of the possession of the plaintiff himself, except when it was laid before the late Chief Justice Sir Hardinge Giffard. The Cangany denies that he had any knowledge of the petition having been presented against Mr. Layard, and expressly denies his ever having

stated to Mr. Layard that the plaintiff had presented a petition against him. 1828. July, 21.

I feel quite satisfied upon this evidence, of the malice of the plaintiff, and of the perjury of his witnesses. And I feel also satisfied that the defendant, Mr. Layard, was not actuated by any malicious motive whatever, and that although he has erred in point of law, he was endeavouring to do what he probably considered as substantial justice.

Under these impressions, the Court is of opinion that the judgment must be entered for the plaintiff, and that the damages be merely nominal, which damages the Court assesses at one farthing.—(Per *The Supreme Court of Judicature*).

1829.

March, 16.

Present:—Ottley, C. J.

1829. March, 16.

Rabinell, et al. vs. Gibson.

No. 5,089.

Where a bill of exchange is proved to have been lost, without being presented for payment, the purchaser is entitled to recover the amount from the drawer.

This action is brought under very peculiar circumstances, and I confess that I have found no precedent, which relieves my mind from the anxiety arising from the recollection of being compelled to apply the principles of law to a case, in which I have not the advantage of the learning and judgment of my predecessors to direct me.

A bill of exchange has been purchased by the plaintiffs from Messrs. Gibson & Co., in the month of November 1818. The bill was drawn on Messrs. Skelton & Co. of Batavia for the sum of 300 Spanish dollars, in consideration of which the plaintiffs paid to the defendants, Messrs. Gibson & Co., 1,200 Rds. current money of Ceylon.

If, in such a case, the currency in which the bill was drawn, has been subject to fluctuation, the value of the bill will be estimated

This bill of exchange was never presented for payment, and must be presumed to have been lost. The drawers either failed, or their establishment was broken up. A correspondence was entered into between the parties, and the result has been that the successors of Messrs. Skelton & Co., have declared by a letter dated 11th May 1826, that if the bill is ever presented, they will refuse it; which clearly shows that the defendants have not sustained any loss by depositing and

1829. March, 16.

by comparison with the currency of England, the drawer being given every advantage of exchange.

retaining in the hands of their correspondents, money to meet the bill when presented; for if any loss had been sustained by the defendant from having their money locked up, or from being compelled to keep it reserved at Batavia, upon proof of such fact, they would in my opinion be entitled to a sum proportionate to the loss sustained in consequence.

Under the circumstances above recited, the plaintiffs bring their action to recover the Rds. 1,200, or according to our present mode of estimating damages, the sum of £90.

That the plaintiffs are entitled to recover, is admitted on all sides, and the only dispute is, as to the sum which they ought to receive from the defendants. The defendants, having admitted their obligation to pay upon security given to idemnify them, offered to give a bill for 300 Spanish dollars. If this were received, the defendants would be considerable gainers which I do not think equitable, because I am by no means clear that, in the event of Spanish dollars having increased in value since the purchase of the bill, the defendants would be obliged to give another bill for the same number of Spanish dollars, as they would thereby be considerable losers, and this being the converse of the proposition, is a fair criterion of its merit.

In case of an inland bill being lost or miscarried, within the time limited for the payment of the same, the holder is entitled to have another bill of the same tenor with that first given, security being given to indemnify the drawer, in case the bill so alleged to be lost or miscarried shall be found again.

In case of an inland bill being lost or mislaid within the time limited for the payment of the same in England, the holder is entitled to recover another bill of the same tenor with that, security being first entered to idemnify the drawer, in case the bill so alleged to be lost shall be found again. This remedy is afforded by the Act 10 Wm. 3 ch. 17. 3,* and if this were a bill passable in Ceylon, and no variation in the value of the currency had taken place, I think that no method could be devised more just than that prescribed by the statute. But neither in England nor in Ceylon could the remedy be complete, if a number of years had elapsed, and a considerable change had arisen in the currency or in the value of the foreign coin for which the bill had been drawn; and if Spanish dollars were now doubled or much increased in value, I think Messrs. Gibson would have much to complain of, if they were compelled to pay the same number of Spanish dollars for which they originally drew the bill. On the other hand, if Spanish dollars were much decreased in value and the currency of Ceylon had remained stationary, the plaintiff would suffer a proportionate loss by being compelled to receive that number

* The 3 and 4 Anne, c. 9, extends, as it seems, this enactment to promissory notes. See Byles on *Bills &c.*, ch. 18. p. 378 (elventh edition).—Ed.

of Spanish dollars only for which the bill was drawn. 1829. March, 16.

I consider this as a case in which money had been paid, and the consideration fails for which the money has been received, and that Messrs. Gibson, therefore, have received so much to the use of the plaintiffs. The question is, how much they have received ; and in order to ascertain that, I must resort to the best standard which the circumstances of this particular case afford. Great changes have been experienced in the value of the Ceylon currency, and the relative value of that currency and of the Spanish dollars has also been subject to fluctuation. We have no standard measure of value which is quite invariable, but the mode in which we estimate the value of all coins is by comparing them to the currency of England or sterling money : which relative value is denominated the exchange. To this standard I must now recur, in order to do justice to those parties. I find that the exchange varied from 12 Rds. 4 fs. to 13 Rds. 3 fs. in the month of November 1818, by referring to the Ceylon Gazette. Taking it at the highest, as being most for the benefit of the defendants, (and I think they are entitled to every advantage of the exchange), and to pay, either according to the former or the present rate as is most for their interest, the sum of 1,200 Rds. will, as nearly as we can estimate, be equal to £90, the sum demanded by the plaintiffs, and which I think they ought to recover as being the exchange of this time and most for the defendant's benefit.

But this is not a case for costs on either side, nor can interest be recovered.—(Per *The Supreme Court of Judicature*).

September, 25.

Present :—Ottley, C. J. September, 25.

Wallbeoff, vs. Mitchell.

This is an action brought by the plaintiff, Mr. Wallbeoff to recover from the defendant a compensation in damages for the injury sustained in consequence of a criminal and adulterous connection between the defendant and the plaintiff's wife. Circumstances proving adultery.

To the libel charging the adulterous connection, the defendant has put in several distinct answers.

First. The answer denies the adulterous intercourse. *Secondly.* The answer states that the plaintiff on former

1829. September, 25. suspicions of the misconduct of his wife had turned her out of his house in Colombo in the year 1825, and immediately after having taken her back, he sent her to England, by force and contrary to and against her consent and will, totally unprotected, and has since been separated from her for three years. *Lastly*. The answer states that the plaintiff has neglected and ill-treated his wife previously to her acquaintance with the defendant and has had adulterous intercourse with divers other women. The plaintiff is a Civil Servant of considerable standing in this Island. The defendant was surgeon of the ship "Elphinstone," in which vessel some of the acts of adultery are said to have been committed.

The first question for the consideration of the Court is whether the fact of adultery has been proved. Now, in order to prove this, the plaintiff has called no less than 7 witnesses all of whom, except Mr. Trant, agree in one point, namely, the marked attention of the defendant towards Mrs. Wallbeoff. The Captain of the vessel indeed says, that he thought it so improper as to induce him to threaten, to turn the defendant out of the cuddy, if he continued to shew such attention; and most of the witnesses speak in the most decided terms of the attention being improper. But whatever suspicion may arise in the mind from a consideration of such attention being towards a married woman, and whatever may be the probability of a criminal intercourse taking place in private, when such marked and improper attention was paid in public, the proof of the adulterous intercourse would be extremely defective if it rested solely upon such evidence. We must therefore consider the specific facts which have been adduced in evidence and are supposed to confirm the suspicion, which would naturally arise from such conduct as has been described.

The first and the most material witness is Elizabeth Wilson, and her evidence goes to prove that when she was in the Island of Madeira, she went into the room where Mrs. Wallbeoff and the defendant were together, that the door was barricaded by three chairs, that she pushed it open, and upon her entrance found Mrs. Wallbeoff lying on the sofa and Mr. Mitchel immediately leaving the room and going out of the window; that she left the room and returned again to make tea in about half an hour, and that during the time she was there, Mrs. Wallbeoff and the defendant left the room, he under pretence of going to see how the ladies slept in so confined an apartment as their bed room, and she offering to go with him; that they remained absent in the bed room for ten minutes or a quarter of an hour.

This is the first evidence of a direct act of adultery. Here

we find a married woman with the door shut and fastened by three chairs in the room alone with a single man, she lying on the sofa and he immediately going out of the window. What conclusion can be drawn from these circumstances, but that a most improper intercourse had commenced? But it appears that the parties were at first taken by surprise in this instance, and perhaps had not completed what they were enclosed for the purpose of effecting. On the same evening after having been found in this situation, they proceeded to the bed-room where they remained ten minutes or quarter of an hour. 1829. September, 25.

After returning to the ship, Elizabeth Wilson tells us that Mrs. Wallbeoff was in the habit of appearing half dressed at her cabin window and nodding to the defendant in the cuddy, and that the improper attention continued.

The next specific fact, besides the marked and improper attention between the parties, and the nodding when Mrs. Wallbeoff was not dressed, is proved by Mr. Titterton, who saw Mrs. Wallbeoff talking in an undertone with the defendant in her night clothes at about 12 o'clock at night, she standing at her cabin door partly shut, he sitting in the cuddy.

Had the intercourse ceased here, however improper might have been the conduct of the parties, still we could not have concluded that any act of adultery had been committed on that occasion, but Mr. Titterton goes on further to state that the defendant put out the light in the cuddy. Here we have the fact of a married woman whispering at 12 o'clock at night in her bed clothes to a single man, and he putting out the light in the cuddy when they were in that situation, such not being his business but the business of the servant. Mr. Titterton goes on state that he remained half an hour longer on the deck, and that the defendant did not come out of the cuddy during that time. To other facts to which Mr. Titterton speaks, are the passing of notes between the parties, their sitting up at cards after the other passengers had retired to rest, and their sitting close to each other and reading out of the same book, as well as their walking together on the deck, and their marked and improper attention. To such an extent was this attention carried and so indecorous did he consider their conduct, that he desired his family to retire from the cuddy table.

The next piece of evidence which is material, is the indecent manner in which Mrs. Wallbeoff and the defendant were standing on the deck, as testified by Atkins, the second mate of the "Elphinstone."

These are the most material proofs of a guilty connection, antecedently to the arrival of the ship at the Mauritius.

Upon the arrival of the "Elphinstone" at the Mauritius,

1829. September, 25. the parties appear to have set all decorum at defiance. Elizabeth Wilson states that, after the ladies had left the ship, the defendant paid Mrs. Wallbeoff more attention than ever, they were accustomed to walk out together on shore, to return at all hours after dark to the ship together, and on one occasion after they had been out under the pretence of looking at spectacles, Mrs. Wallbeoff returned with the defendant, the back of her bonnet being bent in and her hair down.

On Sunday night the 21st June, Mrs. Wallbeoff sat with the defendant reading; at about 11 o'clock she came to bed and told Elizabeth Wilson that she could not allow the children to sleep with her, it was so warm. The next morning Mrs. Wallbeoff opened the door of her cabin a-jar and sent the witness to get her a glass of wine; this was between 10 and 11 o'clock, the witness could not see into Mrs. Wallbeoff's cabin, but after having left her own cabin, and whilst waiting for the time, she turned her head and saw the defendant coming out of the cabin she had left. This cabin opened into Mrs. Wallbeoff's cabin, and no doubt can remain of his having come from Mrs. Wallbeoff's cabin, as the witness states the other door leading from Mrs. Wallbeoff's cabin was closed; the witness returned and found Mrs. Wallbeoff in her night gown.

Now comparing the conduct of the parties on shore, considering that Mrs. Wallbeoff had desired that her child might not sleep with her on the Sunday night, seeing the defendant come from a situation which proves that he had been in Mrs. Wallbeoff's cabin, and finding Mrs. Wallbeoff in her night gown at that period, how is it possible to draw any other conclusion than that the defendant had been into the cabin of Mrs. Wallbeoff for an improper purpose, and that they had arranged the matter between them?

But the evidence however strong does not rest here.

Afterwards, that is to say, on the Monday morning, the parties went on shore together. Mrs. Wallbeoff intended to go to Mrs. Atkinson's, as the witness Miss Elizabeth Wilson believed. The witness heard the defendant tell Mrs. Wallbeoff he thought she had better not go that day, he wished her to stop there two or three days, they remained at Massey's hotel on the Monday. A great deal of secret conversation took place on that day. The parties were much alone, the chairs as close as they could be, the witness left the room, not liking to be present where there was so much whispering. Mrs. Wallbeoff and the defendant wished the witness to remain on shore. They both expressed such a wish. Witness refused to remain on shore. The defendant and Mrs. Wallbeoff retired to a dark

passage, where they remained about five minutes, they procured a boat and reached the ship between 11 and 12 o'clock P. M. Mrs. Wallbeoff was in a great hurry to get to bed; the witness went to bed. About quarter of an hour after, she heard the door of Mrs. Wallbeoff's cabin open. Witness heard Mrs. Wallbeoff say "you have come too soon, Elizabeth is not asleep." She spoke in a whisper. The rooms were dark. The witness heard the defendant whisper. She is quite certain it is the defendant. Mrs. Wallbeoff came to witness's room and called witness who answered not. Mrs. Wallbeoff returned to her own cabin and then the witness heard Mrs. Wallbeoff and the defendant whispering together for about two hours and a half. Mrs. Wallbeoff's bed was large enough for two. From the situation in which witness heard the whispering, she concludes it proceeded from Mrs. Wallbeoff's bed. Witness's door was locked outside as she found out in the morning. Now, if this evidence be true, no more doubt can possibly be entertained of the adulterous intercourse.

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Are the statements here made corroborated? Let us examine. The Steward Lorenzo Vassallo testifies that he locked both the doors because he suspected that the defendant was in Mrs. Wallbeoff's cabin. He states further that he saw the defendant going from below, that he went upstairs, that he followed him in about ten minutes, that he believes he had no shoes on, that he (the steward) went up and locked up the two doors of Mrs. Wallbeoff's apartments, that he remained on the poop about an hour, and that he could find the defendant in no part of the ship which be searched. This was on Monday the 22nd June, the same night that Elizabeth Wilson speaks of, and this testimony of Elizabeth Wilson and the Steward is corroborated by the testimony of the cuddy servant, Anderson, who awoke the steward, and who saw the defendant leave his cabin, and he states that the defendant had no shoes on.

Under all these circumstances, and comparing the whole evidence, I entertain no doubt of the adulterous intercourse having been most fully and completely established, and that the defendant is guilty.

The next consideration is the defence set up by the answer, I will first attend to the proof of acts of adultery committed by Mr. Wallbeoff. But so contradictory is the testimony given by the two witnesses, and so totally incredible the story of the principal witness who was called to prove them, that I think no reliance can be placed on such witnesses, and even if the fact were proved, it could only operate in diminishing the damages.

The next avertment is, that the plaintiff turned his wife

1829. September, 25. out of his house in 1825. Now how is the assertion supported? It appears that Mr. Wallbeoff found the wife at an unseasonable hour at night, talking with a gentleman at her bathing room door. What is the plaintiff's conduct? He was naturally irritated at this behaviour of his wife, as every man would be who had any feeling of regard for his wife and for his own honour; he wished her to leave his house, but does he turn her out of doors? No, he goes for the father and mother of his wife, into their hands he commits her, and she is left under their protection. The plaintiff investigates the conduct of his wife, and he applies to his friend Captain Duvernet, who assists in the enquiry into her conduct, and after the examination, and with the full concurrence of Captain Duvernet, he receives his wife again into his own protection.

In the whole of this unhappy business, the plaintiff manifested a degree of kindness and forbearance which in my opinion ought to have increased the affection of his wife; and which shows nothing but tenderness and consideration on the plaintiff's part.

The next part of the answer avers that the plaintiff sent his wife to England by force and against her consent. This averment is not fully made out, for the wife does appear to have assented before she sailed from Ceylon. Yet, enough has proceeded to show that she expressed the greatest reluctance at being thus sent off from the Island, and she was, as far as appears in evidence, sent off, in a great degree unprotected, to a country where she had no relations except a brother 18 years old. But the plaintiff probably had relations of his own; and no reason has been shown why she omitted to live in their society; but after taking the whole of the evidence on this point into consideration, I cannot help thinking that the plaintiff acted very injudiciously in thus sending away his wife, exposed as she must have been, and without that protection which he could have afforded; and this appears to be more unfortunate, as he had lately entertained suspicions of her fidelity; and she was, as stated by Captain Duvernet, labouring under obloquy, and little esteemed by the society in Ceylon. But we must consider on the other side of the question, that this step of sending Mrs. Wallbeoff to England, was not taken immediately, but after an interval of nearly twelve months, and with the advice of Captain Durbernet himself, who seems to have acted a very friendly part, and was well informed of the circumstances of the family. If Mr. Wallbeoff erred in this instance, he certainly did not act hastily or from the mere impulse of passion, and many reasons might have existed which do not appear, and Captain Durbernet states

that Mrs. Wallbeoff's health was rather declining, and that she took her children with her to be put to school. The parting appears to have been very affectionate, and the letters which Mrs. Wallbeoff wrote to her husband indicate that upon her arrival in England, she entertained a very strong attachment to her husband; so that we may readily infer from all these circumstances, that no degree of harshness could have been exhibited by the plaintiff. As to words of heat and anger, they were naturally provoked and elicited by her conduct.

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The last matter for the consideration of the Court is the question of damages which ought to be awarded for this injury to the plaintiff, and here a most difficult and unsatisfactory task is imposed on the Court. This Court is peculiarly adapted to the decision of a jury, whose accumulated experience judgment and discretion might enable them to form such an opinion as would afford that compensation to the injured feeling of a husband which justice demands. As the Court has not the benefit of their assistance, I will state the reasons which induce me to come to the conclusion which I am about to declare; but before I do so, I have to state that my brother, the Puisne Justice, not having heard the evidence given in Court, I cannot be favoured with his assistance in estimating the amount of damages.

The loose character of the wife, and the poverty of her paramour, are grounds for not awarding exemplary damages.

On the other hand, his professional character, as a medical man, will aggravate the damages, even though no special confidence was reposed on him by the husband.

In the first place Mrs. Wallbeoff appears before the Court in no very favourable light. On a former occasion her husband had separated from her on account of his suspicions of her fidelity, and she was very little esteemed in society, as appears from the testimony of Captain Duvernet. But what is her own conduct when the defendant showed those attentions which were condemned by almost all the persons in the ship? Does she appear to have acted as a virtuous woman? Do we observe any of that dignity of virtue, which characterizes the behaviour of every truly modest woman, when such attentions are paid? Nothing of the kind appears. On the contrary the witnesses say that the attentions were mutual; and how did she behave while sitting in the cabin in the "Elphinstone"? She appears there half dressed, nodding to the defendant, and of course not only encouraging him, but giving that sort of encouragement which no woman of any delicacy would have afforded. What is the conduct of Mrs. Wallbeoff at Madeira? Mrs. Wallbeoff does not here remain passive or content herself with barely encouraging advances. She goes further and requests the defendant to remain on shore. She said to the defendant, "don't go, if the Captain does not send for you" meaning, do not go on board the ship.

On that very evening, the scene which has been described

1829. September, 25. by Elizabeth Wilson was exhibited; and after that witness had come in and found Mrs. Wallbeoff lying on the sofa, upon the defendant enquiring how the ladies contrived to sleep, so many in the apartment at the inn, she actually invited him into the bed-room, where they remained ten minutes or a quarter of an hour. Thus she asked the defendant to remain absent from the ship, and further, not only encouraged him, but actually asked him into the bed-room, where probably, one of the first acts of adultery was perpetrated.

At the Isle of France, she sent her children out of the cabin on Sunday night, on pretence of the warmth of the cabin, and in that bed the defendant must have been. On the Monday night she told him, at his entering into her bed-room, he had come too soon, as Elizabeth was not as yet asleep. When these circumstances are all taken into consideration, and the character of Mrs. Wallbeoff is duly appreciated, I think that this would not be a case for heavy damages at any rate.

The defendant also appears in a humble situation in life, and he still remains in jail, for want of finding bail for his appearance.

The plaintiff will have the satisfaction of knowing that every attempt to injure his character has failed, and that will be some consideration to him. And I wish it to be distinctly understood that the apparent poverty of the defendant, and the loose character of Mrs. Wallbeoff are the sole reasons for not giving exemplary damages in this case. But there is one feature of the case which I cannot omit to notice, I allude to the profession of the defendant. He is a medical man; as such he possessed peculiar facility for obtaining access to the plaintiff's wife; and he appears by the testimony of Elizabeth Wilson to have prescribed for her. Whenever a professional man, in whom confidence is reposed, takes advantage of his situation to abuse the trust reposed on him, he does so at the most tremendous hazard. No special confidence was reposed in the defendant by the plaintiff; yet this last consideration of his profession cannot be omitted in the estimation of damages, which I think ought to be estimated at the sum of one hundred and fifty pounds.

The judgment of the Court is that the defendant is guilty, and that damages be paid to the plaintiff to the amount of £150 with costs of suit.—(Per *The Supreme Court of Judicature*).

October, 16. 1829. October, 16.

Present:—OTTLEY, C. J. AND MARSHALL, J.

Gibson, et al. vs. de Bedier, et al.

(No. 5,335.)

Partnership, its nature, and different kinds of.

This action was brought by the attornies of Jehangheer Nesserwanjee and Company at Bombay, who may therefore be called the plaintiffs on this record, to recover the balance of their account, beginning the 25th of April and ending 19th September 1829, with Benjamin Sanier and Louis Ringwald at Bombay, who admit the amount claimed as due "on account of our joint houses of trade at Bombay and Colombo, our house at Colombo being carried on by our partners under the name, firm and title of *Charles Sanier and Company*.

The liability of the house of Charles Sanier and Company is not disputed, and the only question which the Court is called upon to decide on the present occasion is, whether the 2nd defendant, Henry James Frederick, was or was not a partner in that house, at least so far as to make him liable to the plaintiffs on this account.

In the consideration of this question it must be borne in mind that there are several different kinds of partnership. It may be either *general*, extending to all dealings; *particular*, confined to a particular class of speculations or to some one or more adventures. These again may be either *notorious and avowed* or *dormant and concealed*. But besides these partnerships properly so called, in which a partnership of profit and loss is presumed, there is another class of cases in which a person may be held liable as a partner, even though no community of interest can be proved to exist. This is where a person holds himself out as a partner so as to procure additional credit for the party or parties with whom he is represented to be associated. This representation may be either to the world in general, or to particular firms or individuals, and may be effected either by the avowal of the supposed partner himself, or by his permitting himself to be so held out, which latter source of liability must often be derived from a combination of circumstances; and it is that description which it is necessary to consider on the present occasion.

The facts of the case, so far as they are material to the present occasion, are as follows:—The first defendant, calling himself Vicomte de Bedier, arrived in December 1828 at

1829. October, 16. Colombo, where he established himself as the head of an extensive mercantile firm, at first under the denomination of Bedier & Co., and afterwards under the name of Charles Sanier & Co. In January 1829, the defendant Frederick, in the words of the head clerk of the establishment, " took his seat in the counting house," not in the character of clerk most certainly, nor in that of a general partner, though it is admitted, and indeed proved by the day books, that in certain transactions, to a considerable amount in point of value, if not of number, he was jointly concerned with M. de Bedier. It has also been proved that great intimacy and mutual confidence in matters of business existed between these two persons; that there was but one counting house common to both, and that Frederick took a very active and conspicuous part in the general commercial affairs of de Bedier; that Frederick was accustomed to issue orders relating to the general concerns in de Bedier's absence, and even when this latter person was present, though de Bedier objected sometimes to such interference; that when bills were bought of Sanier & Co. the price was paid to de Bedier or Frederick indifferently, and that Frederick gave receipts for payments; that in like manner, payments were made by Frederick on de Bedier's account from the chest, which was common to both; that bills of parcels were made out in the names of Sanier & Co. and Frederick jointly; though on one occasion, the latter name was struck out at his own request.

On the 8th January 1829, de Bedier writes a letter to the house at Bombay, which appears to me very material in this case. In that letter, the principal object of which seems to be to obtain the co-operation of the present plaintiff in getting certain consignments disposed of at Bombay, and certain bills borrowed, he concludes thus: "*M. Frederick est associe dans notre maison depuis hier*; *il met* 60 *mille roupees pour sa misse*."

On 1st March 1829, the circular, which has been given in evidence, was issued, a copy of which signed " Charles Sanier & Co," but in the hand writing of the defendant de Bedier, accompanied by a letter, also written by that person, as from Charles Sanier & Co., was transmitted to the plaintiffs at Bombay, and has been proved. The circular and letter are as follows.

Colombo, Ceylon, 1st March, 1829.

Messrs. J. N. and Nasserwanjee,
Merchants, Bombay.

GENTLEMEN.

We have the honour to announce we have established a Commercial House at Colombo, under the firm of Charles Sanier & Co.,

and another at Bombay under the firm of Benjamin Sanier, Ringwald & Co. 1829. October, 16.

The members of the two houses consist of Mr. Charles Sanier of Rochelle, Ernest de Bedier, Jules de Bedier, Benjamin Sanier and Louis Ringwald.

Further, the esteem we have, and the nature of our affairs with Mr. H. J. Frederick, induces us to give him the signature of our house by procuration.

We are, &c.,

Charles Sanier & Co.

p. pro. Charles Sanier & Co.

H. J. Frederick.

Written on the obverse side of the printed circular:—

Chers Messieurs.

En vous confirmant notre circulaire de l'autre part, nous vous confirmons et vous répétons que nous avons le plus grand desir de nous lier d'amities et d'affaires avec une maison aussi respectable que la votre; et nous écrivons a Mess. B. Sanier et L. Ringwald de continuer a travailler de conserver avec votre maison et de partager la commission pour tout ce que concernera les affaires de la maison de Colombo.

Votre expérience et l'estime que nous avous pour vous font désirer que vous soyez toujours unis avec Mess Ben. Sanier et Ringwald qui sont des jeunes gens estimables, et qui feront tous les efforts pour meriter votre amitié. Vos bien devonés serviteurs,

Charles Sanier & Co.

On 24th August 1829 De Bedier left Colombo; soon afterwards he quitted the Island, and has not since, as far as appears from the evidence, been heard of.

On 28th August 1829, the following notice of dissolution of partnership, and of the transfer to the defendant Frederick appeared in the Gazette; the original draft of which has been proved to have been sent by Frederick himself for insertion.

The undersigned Charles Sanier & Co. have the honour to inform the public in general that from the 31st August, their commercial house will cease at Colombo, that they have paid all accounts and bills that were due and owing from them on account of their concern, and that no one has any further claims upon them, and that in course of business with Mr. Henry James Frederick, they have sold to him their stock which they had in their godowns and the bills due to them from divers inhabitants, as also the goods they had given for sale on commission. In consequence they beg that such persons as may be indebted to them, will settle and pay their accounts to Mr. Henry James Frederick, Messrs. Charles Sanier & Co. having received value of the same by anticipation.

Colombo, 22nd August, 1829. Charles Sanier & Co.

On 21st November 1829 the letter from Ringwald and Company at Bombay to the nominal plaintiffs at Galle was

1829. October, 16.

written. I do not refer to this document, for the sake of the assertion that the writers, at the time it was written, considered Frederick a partner; because I do not consider that, for that purpose, it would be admissible evidence, in as much as the house at Bombay have an interest now in proving Frederick to have been a partner. But I refer to it as showing, if any doubts could be entertained on that point, that the letter of De Bedier of 8th January 1829 had been communicated by the partners at Bombay to the plaintiff.

Where there was intimacy and mutual confidence in matters of business between F. and B., (who was the head of a mercantile firm), so that the frequency of joint dealing between F. and B., as such, held out to the world the appearance of connection, and where B. wrote to the plaintiffs at Bombay a letter advising them (evidently with the knowledge of F.) that F. had been authorised to sign for the firm, and where a notice of dissolution of B's firm and of transfer of stock &c. to F. appeared in the Colombo *Gazette* and the original draft of such notice was traced to F. himself: *Held* that F. was liable jointly

This is the substance of the evidence upon which the Court is called on to decide the question of partnership; and in a case in which some of the most material facts are involved in considerable doubt, I cannot but regret the want of a jury whose intimate acquaintance with commercial customs and habits would enable them to arrive at a correct conclusion, with more certainty than I can hope to do.

In the course of the trial, the character of the first defendant De Bedier, has been treated with very little ceremony, each party indeed appearing to contend for the privilege of saying that he has been made the dupe of this man. That he has been carrying on a system of fraud by means of false credit, from the time of his first appearance in Ceylon till the moment of his flight, there can, I presume, be no doubt. But when this imputation is made against him, by the plaintiffs on the one hand, and Mr. Frederick on the other, if the question arise which of these must suffer for their credulity, we must consider their relative situations and the means of ascertaining the truth.

The plaintiffs could only judge by the representations made from Colombo through the house at Bombay, or through common report, founded on what was ostensibly going on in the counting house at Colombo; whereas Frederick had the opportunity of satisfying himself on the spot, as to the truth or falsehood of De Bedier's pretensions, or at least, as to the probability of them. If therefore, he has been deceived, it was with his eyes open; and if he has suffered himself to be used as a decoy to ensnare others, who had not equal means of knowledge, or equally strong reasons for mistrusting the principal action, he ought to be the sufferer, rather than the more innocent or less negligent victims. If Mr. Frederick was not deceived, or if he wilfully shut his eyes to the truth, I must consider him as partner with De Bedier in more than mere commercial speculations.

If the question rested solely on the acts of joint dealing and the active part which Frederick has been proved to have taken in the general concerns of De Bedier's business, I am by

no means sure that there would be sufficient evidence, in point of law, to warrant the Court in saying that he ought to be considered liable as a partner to all the world, except those who may have been distinctly told that he was not so. It has been contended on the authority of a case, *Newnham v. Etherington*, not very satisfactorily reported in Mr. Ross' treatise on the Law of Vendors &c. 110, that general partnership cannot be inferred in this case, because the instances of joint dealing have not been shown to preponderate over the separate transactions.

1829. October, 16. with B. to the plaintiffs.

It did not very distinctly appear on which side the preponderance was in the present case: for though the original adventures with which De Bedier and Frederick were proved to have been jointly concerned, were few in number, the minor dealings arising out of them were very numerous; and it is the appearance of connection held out to the world by the frequency of joint dealing which is material rather than the amount as regards value. The opinion likely to be entertained by the world generally may be gathered from the evidence of Mr. Winter, who seemed to be cautious of saying anything rashly which might have the effect of fixing responsibility on Frederick, but who says "that he sold to Bedier and Frederick jointly; that he should have hesitated to trust Bedier without Frederick; that he sometimes thought Frederick was a general partner, and at others that he was only so in particular transactions, especially after he had cautioned him on the subject of his connection with De Bedier." This caution, it is to be observed, was not given till after the appearance of the circular, which was 1st March 1829, and whatever effect Mr. Winter may have supposed would be produced by this advice, he himself states that it made no alteration in Frederick's conduct as regards De Bedier.

Then with regard to De Bedier's letter of the 8th January 1824. If Mr. Frederick knew of that letter, there is an end of the question. I confess the probability appears to me to be that he did know of it. Not to mention the intimacy and confidential intercourse which have been proved to exist between these two persons from first to last, and which Frederick, did not allow to be interrupted by the prudent advice of friends, any more than by the extremely suspicious conduct of De Bedier himself; can it be believed that De Bedier would have ventured to write that letter unknown to Frederick and hope to keep the purport of it secret to him afterwards? He only could have entertained such hope by preventing Frederick from ever glancing his eye at the correspondence with Bombay. The very next post, after the

1829. October, 16. receipt of De Bedier's letter must have brought an answer which would naturally mention the acquisition to the Colombo house. Besides, could De Bedier suppose that Frederick has no private correspondents at Bombay or elsewhere who would congratulate him on his good fortune or condemn him for his rashness, in having been received into the firm? If then I were called upon as a juror, as indeed I am, to say whether that letter were or were not known to Frederick, I should say that I firmly believe it was; if not at the time it was another, at all events, long before the ultimate explosion, and in ample time to have enabled him to undeceive the houses at Bombay.

But really every step in the progress of these transactions seems to prove either a participation by Frederick in the fraud, a conclusion to which I should come and which I even allude to with great reluctance, or else the most wilful and perverse blindness on his part. The circular of the first of March, one would think must have excited the suspicion of any man with common understanding, unless he was a party to the deception. How could Mr. Frederick have consented, innocently, to become the agent and representative of a firm which was henceforth to consist, as far as the Colombo house was concerned of imaginary beings? For it is admitted on all sides that neither Charles Sanier nor Ernest nor Jules De Bedier, ever had any interest whatever in the concern. The instrument too is signed "Charles Sanier & Co." by De Bedier's hand, though his own name is omitted as one of the firm.

When that document was first presented to Frederick, he must have seen that it was De Bedier's object to slip off his own responsibility. When Frederick allowed his name to be thus made use of, I can only look upon the instrument so completed as a joint contrivance, a sufficiently clumsy one indeed, by which these two persons hoped to get rid of their liability to those who had trusted to their joint credit. Mr. Winter gave to Frederick, when the circular appeared, the advice that strange reports were abroad respecting de Bedier, and that Fredrick had better be careful how he continued his connection with him. "Mr. Frederick," Mr. Winter adds "did not take my advice."

The letter written by De Bedier, signed "C. Sanier & Co.," on the other side of the circular, was well calculated to call any doubts on the part of the plaintiffs as to this liability, though as the credit had already been given by them, the effect of that letter is scarcely material.

The last piece of evidence to be observed upon is the

notice of dissolution and transfer to Frederick of 22nd August 1829, and this advertisement, which I have stated was proved to have been sent for insertion by Mr. Frederick himself, is chiefly material to the present question as showing the closeness of connection, which up to the last, in spite of admonition and in defiance of suspicion, existed between De Bedier and himself. The transfer must have been made by De Bedier still representing Sanier & Co., because none of the supposed partners were in Colombo. But is it to be believed that after all that had passed, Mr. Frederick should have "paid value by anticipation for the stock debts &c., " without enquiring into the truth of the preliminary assertion that Sanier and Co. had paid all accounts and bills, "due and owing from them ? " If the question, which the Court is now called on to decide, depended on the validity of such transfer, two opinions could scarcely be entertained. But that discussion has become unnecessary, because Mr. Frederick has given up the property said to belong to Sanier and Co., or rather to Viscomte de Bedier.

Taking therefore all the circumstances into consideration, I feel bound to declare my conviction, that the defendant H. J. Frederick did, either voluntarily and expressly or rather permissively and tacitly, lend his credit to De Bedier as far at least as the house at Bombay was concerned ; that the plaintiff must be considered as having given and continued their credit to these two persons jointly, and therefore that Frederick must be held jointly responsible to the plaintiffs with De Bedier.

A party who by express words or by general conduct holds himself, or suffers himself to be held out, as a partner, is liable to those who contract with the firm.

I have not referred to legal authorities in the decision of this case, because I have not found any cases strictly applicable: nor indeed can that be expected in a case depending on the combination of its own peculiar circumstances. But the principle that any one who, either by express words or by general conduct, holds himself or suffers himself to be held out as a partner, shall be liable to those who contract with the firm, is clear and undoubted law. *Young vs. Axtell*, 2. H. Bl. 242, *De Berkom vs. Smith*, 1. Esp. Rep. 29. If I am wrong in the conclusion to which I have come, it is in having taken an incorrect view of the facts, and I am glad that the amount in dispute will enable Mr. Frederick, if he thinks fit, to have my decision reviewed by a higher tribunal.—(Per *The Supreme Court of Judicature*).

1830.
July, 11.

1830.

July, 11.

Present:—Marshall, J.

Gibson, et al. vs. De Bedier, et al.

The effect of not renouncing the plea of *non numeratæ pecuniæ* in a mortgage bond, and the time within which this exception may be availed of.

The parties in this case are the same as in the case No. 5,335, [which was decided on the 16th of October last.] But the present claim is to a certain house at Galle. The house in question was seized by the Fiscal as a property of Sanier and Co., and if it be decided to belong to that firm generally, the proceeds must go to the general mass of creditors, who have obtained judgment against the house. Messrs. Gibson and Co., however, on behalf of their principals, Nasserwanjee & Co. of Bombay, who are the only creditors who have obtained judgment against Mr. Frederick, as a partner of the firm, claim an exclusive right to this property, by virtue of a bond dated at Colombo, 11th August 1829, according to the tenor of which the premises were mortgaged by Sanier and Co. to Frederick for £150, which sum is stated by the bond to have been borrowed and received by Sanier and Co. of Frederick, and which with the interest would exceed the amount for which the property has been sold. To this exclusive claim the creditors (general) object, on the ground that the bond contains no renunciation of the *exceptio non numeratæ pecuniæ*. And I think that there can be no doubt that, if this objection would have been valid in the mouth of Sanier & Co., it must prevail with at least equal, if not greater, force on the part of the general creditors, who quoad hoc, may be considered as representing Sanier & Co., as Messrs. Gibson & Co. stand in the place of Frederick.

I confess I was somewhat startled when I first heard it argued that this objection, if taken within the time prescribed, must, according to the civil law, be fatal even to an instrument like the present, which expressly acknowleges the receipt of the money borrowed. But looking into the authorities, I find that the proposition in favor of the obligation has been carried even still further, at least formerly, though as is so frequently the case with writers on the civil law, the doctrine is so qualified and frittered away that *moribus hodiernis* a Court of justice is left to choose that side of the question which appears best adapted to the particular case before it.

According to ancient practice* the objection might be made at any time within two years, either by pleading it in answer to an action, or (in order to prevent the supposed creditor from waiting till the prescriptive period had expired) by an action to oblige him to give up the security, or by a formal judicial protest that the consideration had not been paid. And this exception, says the commentator, above all others throws the burden of proof on the creditor: partly on account of the difficulty, which the debtor will have to prove a negative, and partly because distressed persons will do anything in the hope of obtaining money, which the lender may require of them; and thus the security is generally delivered before the advances made. The same reason is given by Hubert, *Modern Jurisprudence* ch. 20, who goes still further and says that the renunciation of this privilege in the bond will not divest the debtor of it, unless it appears to have been explained to him. Lybrecht (on the Office of Notary, vol. 2. p. 253), on the other hand, though as a mere book of practice his individual authority might not perhaps be entitled to much weight, cites Groenewegen and other writers to show that this objection is no longer in use; and that, according to the practice of Antwerp, it is diused in that jurisdiction.

1830. July, 11.

The case which has been cited from Neostadt on the part of Messrs. Gibson in opposition to the objection, is not in point in the present case. That was an action by the creditor, which the debtor defended by the production by a general acquittance or discharge (apocha) which stated the debt to have been paid some years before. The plaintiff replied that he had only granted this acquittance in the hope of receiving his money. But the Court decided, and were confirmed on appeal, in favour of the defendant, on the ground that the creditor should have made his objection within 30 days, the time limited for instruments of this description. The case cited differs therefore from the present: first, in the exception not having been made by the needy borrower, but by the creditor; and secondly, in the time prescribed having elapsed.

The result of these authorities, and of others which I have consulted, among which Voet has failed to furnish his usual proportion of information, is that I should be inclined to exercise some degree of discretion in admitting or rejecting this exception, according to the circumstances of each case. And in the class of cases to which this at first sight belongs,

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* Heineccius in Institutiones Vinnii, lib iii. tit 22, p 664.

1830. July, 11. that of money borrowed on mortgage, I should certainly not be inclined, generally speaking, to lean in favour of the objection, for the reasoning founded on the complying disposition of a distressed man can scarcely be said to apply to a man who has title deeds or other valuable property to carry into the market, and who would not part with such property with the same facility with which a man would put his name to a naked bond who had nothing else to offer as security.

If, therefore, there were no circumstances of suspicion attached to this transaction, if the Court had no reason to doubt the fairness and reality of the mortgage, I much question whether I should feel myself justified in declaring the bond to be void, merely on account of this exception not having been expressly renounced. But such is far from being the case: it appears from the evidence of the Notary that in the first instance he prepared by the instruction of Mr. de Bedier an absolute deed of transfer of the premises; but finding that, a regular survey would be necessary to give validity to this instrument, de Bedier desired the bond to be prepared observing that there was no time to write to Galle on the subject, that a great deal of money was owing to Frederick, and that the house must be secured to him in case of any thing happening to himself, de Bedier. It seems very difficult to reconcile this statement of de Bedier with the view in which Mr. Frederick places it in his account, dated 5th September 1829, in which one of the items is "August 11. To cash lent you on mortgage of your house at Galle, interest at 6 per cent. up to the 5th September 1829 Rds. 2,008. 6. 2." Now it is clear that de Bedier considered that no special sum had been advanced either for the purchase on the mortgage of this house, but that he wished to convey it to Frederick as a security for advances made by Frederick generally. One of these two statements must be incorrect. It is my opinion that neither of them is true.

In deciding the case of *Gibson vs. De Bedier*, which indeed is the case now before the Court, the only question was whether Frederick was to be considered a partner as regarded the houses of Messrs. Gibson's constituents at Bombay. One of the circumstances which influenced my mind on that occasion was the letter written by de Bedier to his correspondents at Bombay, of which I expressed a strong belief that Frederick had a knowledge. But there were many other circumstances to lead the Court to the conclusion at which it arrived: among others, the suspicious character of certain instruments which were filed, one of which was the notice in the Gazette

of 22nd August 1829 of the dissolution of the firm and the transfer of stock, debts &c., to Mr. Frederick. That transfer I considered and do consider to be a mere colourable transaction for the purpose of defeating the claims of just creditors. In precisely the same light do I consider the bond in question. I do not, I cannot, believe that value was ever given by Mr. Frederick for the house, either in the shape of loan, as he himself says and as the bond purports, or in that of general advances to Sanier & Co. as de Bedier insinuates. 1830. July, 11.

It is therefore decreed that the proceeds of this house be divided among the creditors in general; and that the claim set up by Messrs. Gibson & Co. on behalf of their constituents exclusively, be dismissed with costs.—(Per *The Supreme Court of Judicature*).

July, 17.

Present:—Marshall, J.

The King, vs. De Bedier, et al. July, 17.

5,380.

Where goods are imported and deposited in part at the Customs as a security for duties due on the whole importation, the law that the pledge shall not be sold without order of Court, or consent of owner &c., is controlled by Reg. 9 of 1825.

This action has been instituted on behalf of Government to recover the sum of £228 5 11½, being the balance alleged and proved to be due for duties on goods imported at different times by defendants. It appears that a portion of the goods thus imported was deposited at the Custom House, according to the provisions of Regulation No. 9 of 1825 sec. 11, as a security for the duties due on the whole importation; that the goods so deposited, consisting chiefly, if not wholly, of French wines, were considered at the time sufficient to answer the amount for which they were so deposited; that they would have sufficed for that purpose, if they had realized the common market price of similar goods, but that, owing to an unusual depreciation in value, they fell short of the amounts due by the sum which is the subject of the present action.

No defence is attempted to be made on the part of the defendants, who, it is admitted are insolvent. But an intervention has been filed on the part of Messrs. Gibson & Co. of Galle, as attorneys of a house at Bombay, on whose behalf the intervenients had already obtained a judgment against the defendants, and who are therefore interested in defeating the claims of third parties on the property which will ultimately be divided among the creditors, more especially if

1830. July, 17. such claims, when substantiated, should confer a right of preference over the rest.

The intervenients, in the first place, dispute the right of the Crown to recover at all in this action; and they make their objection on two grounds:—

First. That the Crown must be considered in this instance, as a pawnee, with respect to the property deposited as security, and that, as such, its officers had no right to sell the pledge without a decree or some authority of a Court of Justice, or the consent of the defendants, or, as they are in a state of declared insolvency, of the other creditors. This, it is contended, is the general law on the subject, and as such, cannot be controlled by implication, and is not controlled in express terms by the Regulation; that therefore, as this property was sold without such authority, the Crown was a wrong-doer, and cannot now recover the deficiency.

Secondly. That, as the Collector of Customs has a discretionary power, (for this was stated by the gentleman holding that office, in his evidence), as to the quantity and value of the goods received as security, Government must abide by the security as taken, and cannot, if that fall short of the amount due, have recourse to the general property of the importer; that no such deficiency was contemplated by the Regulation, and that the Government by not taking care that the deposit was sufficient to cover the amount of the duties, had in effect, deceived the public, who would take it for granted that the Crown had secured its own interests.

With respect to the first point, it is unnecessary for me, as far as the decision of the case is concerned, to consider the general question of the right of a creditor to sell the pledge which he has received as a security. I shall make some general observations on that question presently, but it is sufficient for the present purpose to say that, in my opinion, the general law is controlled by the Regulation in question. The eleventh section directs "that no articles imported shall be allowed to pass the Custom House till the established duties are paid, or security by deposit or otherwise shall be lodged to the full amount If the deposits be not redeemed within six months, they shall be sold for the satisfaction of the claims of Government, the duties and charges deducted from the amount and the balance of money, if any, paid to the owner."

Not only therefore is the officer of the Customs not precluded by this provision from selling the deposit, but he is actually enjoined to do so at the expiration of six months, without payment. And if he were to neglect so to do, and any loss were sustained in consequence of such neglect, it

might be a question whether he would or would not be responsible for the danger. It was admitted in the present case that the six months had expired. 1830. July, 17.

On the second ground, I am of opinion that the intervenients have equally failed to support their opposition to this action. I see no reason why the Crown should be considered less favourably in this instance than any mortgagee would be. When a man lends his money on the security of a pledge or mortgage, he usually requires that the security should be such as in common probability would cover principal, interest and costs, if ultimately he should be driven to compulsory measures to procure repayment. It must, however sometimes happen, and the deterioration of property in this Island unfortunately makes it a matter of frequent occurrence here, that the property hypothecated falls short of the demand. Yet I never heard it contended that the creditor must stand or fall by the security, and could not have recourse against the other property of his debtor for the deficiency. The only difference between the two cases, is that the person who lends his money usually has in view the profit to be derived from the transaction in the shape of interest, whereas the receiving the deposit, in cases like the present is purely a matter of indulgence for the accommodation of the importer. And to be sure, if the Court could allow itself to be influenced by arguments of expediency, it is evident that, if the opposition of the intervenients were allowed to prevail on this ground, there would be an end of the alternative at present allowed, and the Collector would take care that not a single bale of goods should pass the Custom House till the duty had been paid upon it in cash.

The nature of the security of a pledge or mortgage.

A creditor need not stand or fall by his security, but may have recourse against the other property of his debtor for the deficiency.

Again, there would be no mutuality between the parties, if this argument of the intervenients were to prevail. The Regulation directs that on the sale of the deposit the balance, if any, is to be paid to the owner. Whereas, if the Crown is to run the risk of the deficiency in case of failure to redeem the pledge, it would be but equitable that it should have the advantage of any surplus which might remain. If the deposit were to be considered to be an exact and absolute equivalent for the duties intended to be secured, it ought, as soon as the six months had expired, to vest absolutely in the Crown.

It has been urged, and very properly, by His Majesty's Advocate Fiscal that this was a contract between the Government and the defendants, with which the intervenients had no concern and these latter parties could not stand in a better situation than the defendants themselves could have done. It is unnecessary however for me, after the opinion I have given as to the validity of the objections themselves abstractly

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considered, to enquire whether, supposing them to have been entitled to weight, it would have been competent for the intervenients to avail themselves of them. I have stated that the terms of the Regulation make it unnecessary, as far as the decision of the Court is concerned on the present occasion, to decide the more general question as to the right of the pawnee to sell the property pledged with him. But I am unwilling to pass that point over in silence, first, lest any inference should be drawn from the present decision in favour of such general right; and secondly, because I wish to acknowledge the numerous authorities which the industry, exerted on both sides, has supplied to the Court, and which may be of use to future suitors in cases similaly situated.

The right of the pawnee to sell the property pledged with him, considered.

M. Pothier in his edition of the *Pandects*, bk. I. tit. 5. sec. 18. and 19, says "if the creditor be in possession of the pledge, he may sell it" (supposing the debtor to have made default) "without any judicial authority. All that is required is *that he give his creditor notice*, and that he conduct the matter fairly." Again "if a creditor wish to sell a pledge, which has been deposited with him unconditionally as to the time of its redemption, he should give his debtor notice three times to redeem it, otherwise that it will be sold." At the end of the section, indeed, Pothier observes that it had been decreed by Justinian that "where the mode of selling the pledge is agreed upon, that mode shall be pursued: otherwise, it shall be lawful for the creditor after notice (*ex denuntiatione*) or by a judge's decree, to sell it at the expiration of two years from such notice or decree": he adds in a note that *Donellus* (*de pignoribus*) endeavours to prove the intervention of the two years was only applicable to the case of a creditor, wishing to be declared the owner of the pledge, that is, that the property, on the default of redemption, had vested in himself the creditor. And Voet lib. 20. tit. 5, *de distractione pignorum et hypothecarum*, seems to agree with this opinion of Donellus. In Wilmot's treatise on the English Law of Mortgages, it is said that by the civil law, in case of delay of payment, the creditor had power to sell the pledge, allowing his debtor two years after notice given to redeem it. However this may be, Voet distinctly says (sect. 1.) that one or more notices (using again the word *denuntiatio*) should be given to the debtor before proceeding to the sale, which he observes afterwards (sect. 5,) should be conducted in a formal manner, and by public auction, particularly if it be of real property; and he carries this principle of publicity so far that he goes on to say (sect. 6,) that the mode of selling pledges which has been established by the law of the place, or by ancient custom,

shall be observed, and shall not be departed from by private contracts between debtor and creditor. So that even a stipulation that a creditor shall be allowed to sell by his own private authority, shall not do away with the necessity of a public sale:" for which position he cites a case from *Neostadt* p. 245, which has been also relied upon in this case by the intervenients. *Ayliffe* p. 534, limits his previous more general doctrine as to the right of the creditor to sell, and says that this should be done by virtue of a judge's decree. So *Domat* bk 3, tit. 1 sect. 3 par. 9, thus explains the creditors power of selling: "We do not say in this article that *the creditor may sell* the pledge, but only that the pledge *may be sold.* For by our usage, the creditor cannot of his own authority sell the thing he has in pawn or mortgage as he might have done by the Roman Law. But the thing must be sold either with the debtor's consent or by authority of justice." 1830. July, 17.

The English authorities, of which I am only aware of two which bear immediately on this point, are more favourable to the right of the creditor to sell. In Jacobs' *Law Dictionary* title *Pawn*, it is said, that if goods are redeemable at a day certain, it must be strictly observed; and the pawnee, in case of failure of payment at the day, may sue them, and cites 1 Roll. Rep. 181,215. A later dictionary of Tomlins' adds: "but still the right owner has his redemption in equity as in case of mortgage," citing 1 Inst. 205. I have looked at the authority last mentioned and certainly find nothing to warrant the addition of Tomlins. At all events the right of redemption, as the Advocate Fiscal has observed, must be examined before the pledge has actually been sold.

The other English authority is the case of *Pothonier vs. Dawson*, Holt's Rep. 385, in which Lord C. J. Gibbs, is reported to have said that "when goods are deposited by way of security to indemnify a party against a loan of money, the lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. It may be inferred that the contract was this: If I, the borrower, repay the money, you, the lender, must redeliver the goods, but if I fail to repay it, you may use the security I have left to repay yourself. I think therefore the defendant, the pawnee, had a right to sell."

The authorities to which I have alluded and the greater part of which were cited at the bar, are not, it must be confessed, so conclusive or so consistent with each other as might have been wished. But thus much may, I think, be inferred from them, that though the lapse of two years may not at this day be required to intervene between default of payment and the

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sale, yet that it would be much more prudent, as Vander Linden in his *Institutes* p. 180 observes, for the creditor to obtain the authorization of a Court previous to proceeding to a sale. That some sort of notice is necessary to be given to the debtors, appears to be agreed by all the authorities from the Civil Law. And from the use of the word *denuntiatio*, I should say that there should be something more than a mere intimation in the ordinary sense of the word. A citation to the Court having jurisdiction, answering to the English term "*rule to show cause*," would, as it appears to me, be the mode which would most satisfy the force and meaning of the Latin expression.

To return however to the case immediately before me: the judgment of the Court is that the opposition of the intervenients be dismissed and that the Government do recover against the defendants the sum of £228 5 11½ which has been proved to be still due for the duties.

The Crown, as creditor of an insolvent estate, has a preferential right over other creditors, in respect of debts due as duties, taxes or tribute.

Judgment having been thus given for the Crown, the question arises as to the right of preference over other creditors, the Advocate Fiscal insisting on the general rule, that the Crown is entitled to a preference till the subject's execution is complete; Mr. Staples, on behalf of the intervenients, contending that no such preference exists in the present instance, from the defendants being insolvent.

The principal, indeed I may say, the only authority cited on the part of the intervenients, which goes the length of supporting this denial of the ordinary rule of preference, is the following passage in Vander Linden's Institutes, lib. i ch. 12. sec. 2. p. 174, according to the English translation lately published by Mr. Henry. After stating (among other instances in which the law gives a tacit right of mortgage to the Crown on the goods of those who are in any way employed in the collection of the Revenue), the author is made to continue thus:—

"In other cases, when the Crown is a creditor with others of an insolvent estate, it has no further right than other creditors," for which latter position is cited a Resolution of the States of Holland of 25th February 1678 in the Groot Placaat Boek" 3. D. page 591. That resolution has, I am assured, been faithfully translated, * and as far as I am able to understand the purport of it, by no means supports the dictum which Vander Linden, or the translator, has pronounced on

* The translation of this *Resolution* forms part of the Records of the Supreme Court, and will be found in the Appendix to these Reports.—Ed.

its authority. It appears from the preliminary matter which forms the much greater part of the instrument, the Resolution itself being very short, that a question had arisen whether the management of a certain insolvent estate should remain with the *Scheepen*, the Court of ordinary jurisdiction, or should devolve on certain commissioned judges who claimed the right of superintendence. It was a question of jurisdiction rather than of preference, which latter point indeed was left to be decided by whoever should have the management of the estate. Accordingly, the Resolution decrees "that in case of insolvency of any estate, of which the States might be one among other creditors, in such a case the said States cannot be considered otherwise than in *privatorum loci* in all judicial acts done with respect to the said estate ; and therefore the ordinary judge of the place must, with the concurrence of the creditors, allow the appointment of a curator, for the administration and sale of the property, the depositing of money, the proceeding about the right of preference &c.

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All that appears to be decided by the Resolution is, that Government shall not sit as judge in its own cause ; that if it have a right of preference (a point not decided by the Resolution), it must be content to receive that privilege as awarded to it by the ordinary tribunal. It is remarkable that the words in Vander Linden, "in other cases" are put in contradiction to the cases contemplated in the preceeding passage : namely, cases of claims against persons employed in the collection of the revenue. The passage therefore, which is supposed to rest on the authority of the Resolution, must be intended to apply to claims against *others* than those employed in the collection of the revenue; whereas the estate in question in the Resolution is expressly declared to be that of a late Collector of the Revenue.

With the exception then of this doubtful authority from Vander Linden, the writers on the Civil Law, which have been cited and whom I have consulted, agree with the rule of preference as it exists in England. And I shall simply content myself therefore, with referring to the respective authors :—

Pothier, lib. 49, *Pandectarum*, tit. 14, *de jure fisci*, sec. 39, 40. *Voet ad Pandectas*, 20, 2, 8 *et seq*. *Heineccii Elem. jur. civilis*, 49, 14, 290. *Groot's Inleiding*, 2, 48, 15. *Vander Keessel ad Grotium*, 2, 48, 455 and 456. *Domat*, bk. 3, tit. 1, s. 5, per 18 *et seq*. Wood's *Civil Law*, p. 220. *Van Leeuwen*, p. 358, 9 and 360.

It is therefore decreed that the present claim be satisfied out of the property of the defendant in preference to other creditors.—(Per *The Supreme Court of Judicature*).

1830. November, 10.

November, 10.

Present:—Marshall, J.

Gibson, et al. vs. Rodney.

1. Registration of Minute of Annuity.

2. Provisional judgment.

This action is brought by the attornies of E. J. Scott, who is the executor of John Scott, to recover the sum of £840 being the arrears for 28 years of an annuity of £30, granted by the defendant to the testator by deed, dated 20th April 1801 and executed in England, the defendant having quitted England, as the plaintiffs allege in the libel, in 1803, from which period no payment of the annuity has been made.

The defendant by his answer avers (1st) that no memorial of the annuity deed was enrolled in Chancery within 20 days from the execution thereof, as required by statute 17 Geo. iii ch. 26; (2nd) that the deed was obtained by fraud, that the grantee and others falsely represented to the defendant that he should receive the full consideration money of £180, whereas the defendant was induced by fraud to return a great part of that sum whereby the deed became void.

With respect to the *first* ground of defence, I am compelled, though with some reluctance, to say that the opinion which I entertained when the case was first brought before the Court and which I then intimated to the bar, remains in substance unaltered. The statute already adverted to, which is the act which must govern this case, required that a memorial of every annuity deed of a nature similar to that in question should be enrolled within 20 days after its execution, on pain of nullity.*

The defendant avers that no memorial has been enrolled; the plaintiffs assert that a memorial was enrolled in due time, to wit, 9th May 1801. It is for the plaintiff therefore to prove the affirmative which they have taken, and necessarily taken, upon themselves to make. Has then that affirmative been proved? The only evidence of such enrollment is the following endorsement on the deed:—

"A memorial of this deed was enrolled in His Majesty's High Court of Chancery, the 9th day of May, in the year of Our Lord 1801, D. Drew."

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* As to the present law on the subject, see 17 and 18 Vict. c. 90. and 18 and 19 Vict. c. 15.—Ed.

Who this D. Drew is, or was, by whom this memorandum purports to have been made, whether he was a person duly authorized to make such indorsement or whether this be really his signature, there is no evidence whatever to shew. If, indeed it had been proved that he was the clerk of the enrollments on 9th May 1801, and that it was his duty to make this endorsement on the deed, or even if the certificate purported to have been signed by him in that character, the Court would probably have felt justified, under the authority which has been cited of *Kinnersly vs. Orpe*, Douglas 56, to declare this certificate sufficiently authentic. But giving the fullest effect to that decision and to the analogy which Mr. Justice Buller draws from statute 27 Hen. 8 ch. 16, it must be recollected that the opinions both of Mr. Justice Buller and Mr. Justice Willes were founded on the fact that the memorandum was the certificate of the proper officer, and not of a private person as had been contended at the bar; the signature in that case was "J. Fury, Auditor"? and this principle is fully recognized by Mr. Phillipps in his treatise on *Evidence* vol. 1. 310, 3rd. edition, provided that instrument offered in evidence be authenticated by *the officer appointed for that purpose.* Whereas here, there is nothing but a bare and gratuitous presumption to lead the Court to suppose that "D. Drew" was more than a private unauthorized person.

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This defect in the plaintiffs proof can only be remedied by a commission to examine witnesses in England, and of that commission the defendant, on whom, it is scarcely necessary to say, lies the burthen of substantiating the second ground of his defence, can avail himself.

The necessity of such a commission having become apparent, the plaintiffs counsel has moved that the defendant may be compelled, either to pay into the Court the amount, or at least to give security for the payment of it, if it should be ultimately decreed to the plaintiffs. The defendants Proctor resists this application on four grounds:—

Whether the practice of demanding *Namptissement* is obsolete.

1st. That the practice of demanding *Namptissement* or provisional payment is antiquated and obsolete.

2ndly. That it has been superseded by the 28th clause of the Charter of 1801, which provides another mode of security, by arrest of the person of the debtor.

3rdly. That *Namptissement* can only be demanded where the debtor admits his liability; and

4thly. That it cannot be decreed where fraud is alleged against the claimant, as in the present instance.

With respect to the *first* and more general ground, I certainly see no reason for considering this practice as absolute.

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It is treated of by all the civil law writers whom I have been able to consult, and Vander Linden, who published his *Institutes* as late as 1806, speaks of it as a custom frequently in use, and considering the very brief and elementary nature of the work, lays down very clear and distinct rules for deciding in what cases it should be granted.

The necessity of affording such provisional security to creditors suing at this distance from the scene of the original transaction, applies with peculiar force, and it would be easy to mention cases in which a refusal to grant such precautionary relief would amount to a total denial of justice.

Whether *Namptissement* has been superseded by the Charter of 1801.

Nor, *secondly*, do I consider that the 28th section of the Charter has superseded, or in any way affected this mode of proceeding. That clause declares in what cases a warrant of arrest may issue against a defendant, and prescribes the course of proceeding on such warrant. But it does not make that process substitutionary of those which exist by the common law of the Island, and which remain untouched by the Charter. There are other reasons besides these which the Charter specifies as grounds of obtaining a warrant of arrest, which may often make some measure of precaution necessary to secure a debt during the long interval which must elapse before evidence could be procured from Europe. I need only give as an example the possibility of the death of a defendant. It is true, as has been urged, that the Charter as it now stands, allows of the arrest of any defendant, whether suspected of an intention to quit the jurisdiction or not, for a debt which is sworn to exceed Rds. 100. But I can never admit that this extensive and extraordinary power of arrest is given to the exclusion of the milder course of proceeding prescribed by the ordinary rules of the civil law. And here the passage which has been cited from Voet (42, 1, 12) on the part of the plaintiff is in point, to show that this application may be made in the progress of the suit, if the plaintiff has reason ‡ [to apprehend a longer delay than at first appeared probable. Whereas the Charter of 1801, literally adhered to, would seem to contemplate only an arrest issued in the first instance, in lieu of the common citation.

Whether an admission by the debtor of

In answer to the *third* ground of objection, it would be sufficient to say that in the present instance, the defendant admitted in Court that he believed the signature to the deed,

‡ The rest of the Judgment is missing in the Minutes of the Supreme Court, but I have been able to restore it from the late Mr. Lorenz's treatise on *Namptissement*, (now a very scarce work) in which the present judgment is printed *in extenso*. The part so restored I have placed within brackets. —Ed.

and to the receipt endorsed upon it, to be his. But I am very far from agreeing that such admission would be indispensable to the success of applications like the present. According to Voet, (*ibid*, s. 7) even if the defendant positively denies his signature in open Court, the decree of provisional payment is only to be *postponed*, until the plaintiff shall prove the defendants signature. If, therefore, that fact be proved in the first instance by other evidence, the admission or denial of the defendant would be of no importance.

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his liability, is indispensable to a prayer for *Namptissement*.

The *fourth* and last objection proceeds on the fallacy of supposing that a bare *allegation* of fraud is sufficient to bar the plaintiff of his claim to this relief. On this branch of the subject, Vander Linden says—'On the part of the defendant, to prevent provision or *Namptissement* being decreed against him in such cases, he must produce such counterproofs as appear to the Judge to render it probable that the plaintiff will not succeed on the merits' *Instit.* 3, 1, 12. Indeed, if this were otherwise, and a naked averment of fraud were deemed a sufficient answer to the application, no European creditor could ever hope to avail himself of it, unless the debtor here consented to it. There is a passage in Voet (42, 1. 9) which appears to me to bear closely on this objection:—'Nor will the exception, that the sum mentioned in the instrument has not been paid, avail the defendant, if, by renunciation of that exception' (and I cannot but think that in the present case the defendant's own signature to the receipt of the consideration in six banknotes, the number and value of each of which are specified, is fully tantamount to the renunciation required by the civil law), 'or by the lapse of two years, if no renunciation have been made, the burthen of proof should be thrown, not on the plaintiff, but on the defendant who pleads the exception &ca.'

Whether a bare allegation of fraud is sufficient to bar *Namptissement*.

The Court is of opinion that the plaintiffs are entitled to the security for which they have applied; and it is therefore ordered that the defendant do either pay the sum of £840 into Court, to abide the result of this suit; or else that he give security for such sum as may ultimately be decreed to be due, if any, should be so decreed].—(Per *The Supreme Court of Judicature*).

1832. April, 16.

1832.

April, 16.

Present :—Rough, J.

Gibson, vs. Ackland and Boyd.

1. Admissibility of a deed under certain circumstances.

2. Fradulent preference.

3. Whether mortgages of immovable property have to be passed notarially &c.

This case has been brought before the Court by the litigating parties with great fairness and simplicity.

The Assignees of the estate of Palmer and Co. late of Calcutta bring their suit here against the assignees of the estate of Messrs. Beaufort and Huxham; and on both sides all technical and other objections in respect of the proof of the characters in which they each appear being waived, the sole question has been narrowed, by consent, to the enquiry, whether a certain deed or instrument bearing date March 2nd 1824, purporting to be a conveyance of certain premises, situated in this Island is or is not a valid or binding deed.

An objection was at the opening of the case early taken against the production in evidence of this deed at all, on the ground of its being deficient in the requisite stamp imposed here upon all deeds of transfer and other special writing by our Government Regulations. Stamps upon instruments executed in Calcutta were in 1824 not requisite.

It appears however that the deed, which is the subject of our present investigation, though probably prepared in Calcutta, was partly and finally executed in this Island. Proof nevertheless being given that none of the parties of the house of Palmer and Co. were during this transaction commorant or resident in Ceylon, and at the same time it not appearing that Gibson and Read were attornies for that house for all purposes whatsoever, the Court adjudged in favour of the admissibility of the instrument, treble stamp duties being paid upon it, within the purport and meaning of section or clause 15 of Regulation No. 7 of 1823. With the correctness of its decision upon this interlocutory point, the Court has had full reason to feel satisfied since this case has been gone into further: for it is beyond all doubt upon the evidence adduced, that not only were the partners of the house of Palmer and Co. not commorant and resident in this Island, but that their attornies here for all common and usual purposes, Messrs. Gibson and Read, were uninformed at the time of this transaction. Nor indeed did it appear since the admission of the deed

in evidence, that any design to avoid payment of the duties originally existed in the minds of the parties at the time of the execution of such deed, such design the Court would have held to be a fraudulent ingredient in its concoction and would have decided so accordingly. 1832. April, 16.

The real objection however made, since the admissibility of the deed being determined on, is that it was a deed fraudulently obtained to secure an undue preference, and therefore void—and that it is also void, because although it be a deed meant to pass immovable property, it yet has not been passed notarially, or with an observance of the forms required by the law of the Island.

The objection on the ground of a fraudulent preference is, *first*, to be disposed of. Now, it is not denied, but that a large debt was due to the house of Palmer & Co. from the house here, a debt in fact due to the house of Palmer & Co. not only from the conjoint house of Huxham and Beaufort, but from Huxham and Beaufort, severally. Not only has a judgment been obtained here in this Court, October 27th 1830, against Mr. Beaufort but also (December 8th) against Mr. Huxham. These judgments are of course both unsatisfied, but a debt stands confessed.

It is urged however that a fraudulent preference must be inferred, because although the instrument of mortgage bears date 1824, yet the title deeds of the houses intended to be secured to Palmer & Co. were not put into the hands of Messrs. Gibson and Read, the then attornies of Palmer & Co. until October 1830. It is further urged, that it must be concluded from certain letters addressed by Messrs. Palmer & Co. to Mr. Beaufort, dated 14th July 1825, 20th July 1825, and 6th September 1830, that they were cognizant of the embarrassed position in which Mr. Beaufort stood; and were a party to fraud in not earlier possessing themselves of the title deeds.

The Court has perused these letters with attention: they are letters of business, but yet shew no unkind feeling towards, or want of consideration for, the convenience and accomodation of Mr. Beaufort.

The house of Palmer and Co. had in fact, as it had reason to suppose, in a degree secured itself by the deed of 1824. By the delay in obtaining the possession of the title deeds, it cannot be shewn, that any one was especially injured; for in respect of the houses themselves, no assignment of them, as far as the Court is informed, has ever been attempted to be made, save to Palmer and Co., and the letters are written in a tone, evincing a hope and almost an expectation that the

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affairs of Mr. Beaufort might be retrieved. The deed executed 1824, naturally enough was not sought to be made available, until an absolute necessity arose. The Court cannot find any legal fraud in this and, as to any preference shewn to Messrs. Palmer & Co. by Mr. Beaufort, what was at last done, was clearly done, because it was unavoidable. The house of Palmer & Co. through Messrs. Gibson and Read, enforced at *last*, what might have been enforced *sooner*: as to Mr. Beaufort himself, there was no voluntariness on his part: under the urgency of his circumstances, he completed what he had undertaken to perform long before.

Dismissing therefore the objection, founded on the suggestion of an illegal preference, there remains to be considered, that other objection grounded on this not being a notarial instrument, nor one executed with due sufficient solemnities.

The state of the Law of Ceylon (prior to the Ordinance No. 7 of 1834) as to mortgage of immovables, and the solemnities required therefor.

The Court at first, certainly, entertained much doubt upon this. From a case heard and argued before the Privy Council at home—that of *Vanderstraaten vs. The Government of Ceylon*, decided June 15th 1829—we learn (I know not whether a different opinion ever obtained here) that the Supreme Court and the High Court of Appeal have not introduced here fully and generally all English Law as subversive of the Colonial Law before existing, but on the contrary that both (Courts) by the Charter are directed to proceed according to the positions and bearing of the Dutch Law previously established. Many changes in, and contradictions to, the Charter have from time to time occurred, but this, as declared by the Lords of the Council in the case above cited, must still be taken to be a fixed and undisturbed principle.

Now by the Dutch Law and usage, a mortgage of immovable property was effected only by an instrument passed with notarial solemnities of the highest and gravest nature. It was the custom to acknowledge a mortgage deed before the President of the Civil Court of Justice, or its Secretary and Commissaries: without this form being observed, the deed invested the mortgagee with no preference. Even other deeds and writings of less weight and importance were required to be executed and acknowledged notarially.

In consonance with this undoubted doctrine, in a case *Gerhardus vs. Sutherland*, this Court (Sir Alex. Johnstone, being then, as it should seem, the sole acting Judge), held a mortgage bond, because not notarially, but only individually, signed and witnessed, invalid and of no effect, awarding costs of suit against the defendants, who produced it.

Now, this case was certainly one of much hardship. It appeared by the evidence in that case that, almost from

necessity, under the circumstances of the Settlement, mortgages between European individuals had ceased to be executed with the before established formalities, and in their place had been signed and delivered, privately and interchangeably, without any intended or imputed fraud. The Civil Courts of Justice and those of Land Raad were superseded, first, by the surrender of the Colony to the English, and the proclamation of Governor North, 1st of March 1801, and afterwards by the introduction and establishment of the Supreme Court of Judicature, a Board of Commissioners was established by whom a Registry of mortgages and deeds was kept. This, however, was abolished in 1805. The Supreme Court (created by the King's Charter) was, it may be thought, too high for deeds (as heretofore in the lesser Courts scattered throughout the Provinces) to be framed and passed before it: and mortgages and deeds were passed, for some time, by means of printed forms forwarded in blank by Government to the Registrar of Lands and by him filled up; upon the abolition of the Office of the Registrar of Lands, they were executed in a great measure privately, without reference to the previous established law. Nevertheless, the law being referred to in this case, the mortgage bond not being notarially executed, was declared invalid. 1832. April, 16.

We are now arrived at that point of the case, when it must needs be asked, *is the deed in question before us* void and of no effect, because not solemnly as heretofore, nor notarially, executed? That during the thirty six years, since which this Island has become a British possession, there has not been exerted, during the rule of the Governors successively stationed here, though a well meant, yet a too great, spirit of legislation (more especially, when it is borne in mind, that the Legislator has been sole and single) may perhaps *scarcely* be affirmed. *Some* change, *some* alteration, in the law and rule of all ceded Colonies, is inevitable, from the mere circumstance of a transfer of dominion. Whether, occasionally, however, somewhat more may not have been attempted here with the best intentions, than was absolutely necessary or expedient, it is not for a Court of Judicature to say: it is its province to deal with law as it is found here.

The Bankrupt Regulations themselves of 1806, benevolently meant as they doubtless were, nevertheless were scarcely called for by the wants of the Settlement, in as much as two commissions in cases of bankruptcy alone have issued since that date. This suit arises out of the second commission issued within the Island. They have intermingled with, and may be holden to have superseded, the Dutch Mandament of Sovereignty of their High Mightiness, the Writ of Cessio

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Bornorum ; yet so beneficial may they be made hereafter, that it would be an act of culpability (certainly of weakness).* The impugning them, they have been decided on as existing law by the Lords of the Council. These Regulations however give no aid to our enquiry, as to the present instant question, for they only state clause 29, that claims notarial bonds, mortgages and executions obtained before the appointment of Commissioners shall be preferred to those of other creditors.

But though the Regulations themselves say nothing of the validity of deeds not notarial—yet there has been pointed out a clause in the Governmental Stamp Regulation of 1817, (No. 2), which certainly bears upon this strongly. It is there enacted and declared, that it shall not be necessary to the validity of any conveyance, lease, or deed of mortgage, that the same should be written or executed before, or registered by, any notary public or other officer, and the same clause has been repeated and enacted in the Governmental Regulation of 1823 (No. 7), although true it be that in 1824 a later Regulation has reverted to, and restored the force of, notarial executions.

As this clause then was found in regulatory enactments, seemingly having relation to other objects than the declaration of a general law adverse to that before established, it appeared to the Court incumbent on it as a matter of duty to enquire, to what extent *an alteration* of law was *really* in view of the legislating power here of the time. All papers, it is mere justice to the now Government to say, at all connected with these enactments, have been copiously and freely communicated to the Court ; and in justice to the past Government of 1816, I am bound also to say that no pains were spared, no information unsought, and no considerations passed over at the time, which could at all avail, as to the settling the tendency and utility of the measure then proposed for adoption. It certainly *was* in the mind and view of the then legislating power to render valid all deeds and mortgages, though not passed before a Notary, and it is clear from the extensive communications made and consultations held, that the case decided (and rightly decided) in this Court of *Gerhardus vs. Sutherland* was contemplated at the moment as shewing a remedy to be required against the recurrence of any similar hardship. I cannot consider it either as an hasty or injudicious alteration of the law at that time, though (were it so) I should now deem it necessary to affirm it to be law notwithstanding, for the words admit of no other interpretation.

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* The whole of this paragraph is very defective.—Ed.

1832. April, 16.

But the truth is, it was no regulation wantonly or heedlessly enacted, but one called for and demanded by the altered circumstances of the territory. It is impossible therefore, with the knowledge which the Court possessed, for it *now* to say, that the second objection, namely, that the deed is invalid because not notarially executed, cannot be supported. Some observation has been made, upon the words of the clause in the regulatory stamp acts, reservatory of the preference to notarial writings by law established. This Court, having to deal with no question at present raised as to preference, thinks itself not called upon to explain what is meant by these expressions. It is enough, that it adjudges, as it does, this deed to be valid.

Observations in respect of proceedings in bankruptcy.

One or two points, circumjacent and skirting the question especially under discussion, the Court thinks, it may be well to notice. It has distantly been conveyed, rather than contended (though not by the party defendant, who has wisely acquiesced in the jurisdiction), that this Court has in truth no power to entertain the case at all: it would, were it so, be curious. Whether the Bankrupt Regulations were or were not prematurely passed, in derogation of the Dutch Sovereignty vested in the Crown of England, it is not necessary now to enquire. But with reference to the Regulations, under which the *two* commissions alone issued, in both has notice of their issuing and of their existence been expressly given to this Court: in 1816, under the first issued commission against the estate of Longlin, the assistance of this Court was sought for and obtained: the Advocate Fiscal brought here successfully, his action on the behalf of Government against that estate. Can it be imagined that the Government would seek, from the instrumentality of this Court, and receive a benefit, yet deny to it the power of administering right according to its conscience when another party claimed such at its hands? It cannot be supposed. Yet another point incident to the outlying parts of this discussion. It has been objected, that the bankrupt laws having been introduced here as a systematic whole, they should be treated as an whole, an English systematic whole. This Court does not consider itself at liberty so to do. Had any defect in proof been urged against the acts of bankruptcy alleged under the commission, the Court would have given time to the defendants to prepare themselves for the support of such and have stayed proceedings, but it would not have dismissed the plaintiff's libel, because notice of an intention to dispute these acts had not been given.

Lastly, the Court considers and adjudges that this deed of

1832. April, 16.

1824 being valid, the contract of mortgage is not vitiated on the supposition that the plaintiffs were not possessed of the title deeds of the premises mortgaged until after even the first act of bankruptcy had been committed. The property by Dutch Law is not divested out of the bankrupt from the time of the act of bankruptcy, as is the Law of England, but from the time of the *concursus creditorum*, that is, when an actual assignment has taken place in pursuance of the appointment of curators. The deed of 1824 having long preceded this, the Court is of opinion that the right to the premises in question did not devolve upon the Commissioners, and it therefore now pronounces its decree in favor of the plaintiffs.—(Per *The Supreme Court of Judicature*).

August, 4.

August. 4.

Present :—ROUGH, J.

Pautma Natchea, et al. vs. Tanga Oumma, et al.

Where an execution is sued out of one Court against property in the custody of another Court, it will be competent for the latter, though not having appellate jurisdiction over the former, to grant the parties an issue on allegations of fraud or insufficient inquiry &c., and to entertain itself the trial of that issue, or leave it to the other Court to be tried.

In this case, which is addressed to the Court in its equitable jurisdiction, there are facts disclosed in the bill of complaint filed, which undoubtedly have not received that full and sufficient answer which might be desired, and it would be very difficult to say, that the bill can be at once dismissed. A requisition has been made to the Fiscal of Colombo, calling upon him to take out execution against property now in the custody of this Court, and such execution is stated to be in pursuance of a judgment obtained in the Provincial Court. It is alleged by the bill, that this judgment was obtained by fraud. This Court ought to pay all respect to the judgment of the Court below, and is disposed to do so. But when fraud is averred, suspicious circumstances betray themselves, none of which could have been known to that Court : there does seem reason for saying, that monies deposited in this Court, should not be taken out of it, through collusion, nor without a full investigation of the subject matter, so that the conscience of this Court, may be satisfied in respect of its future course of proceeding. The Court is of opinion with reference to the words of the Charter, and the meaning put upon them by the decisions of the Judges of the Supreme Court previously sitting here, that it *has* a jurisdiction sufficiently wide to embrace this case.

It is not its duty, neither is it its design, to interfere with

the judgment of the Provincial Court, that judgment can only be set aside on appeal by the High Court; but this, the Supreme Court may and ought to do, (should there be found grounds for interfering) *protect* the fund, placed for the benefit of all parties, in consequence of the letters of administration taken out, under its care and safeguard. 1832. August. 4.

The Court is disposed to grant the parties an issue: it has such proper confidence in the Provincial Court, that it would be content to leave the trial of that issue to that Court, subject to the finding being returned by that Court here.

As this mode of proceeding might however be encumbered and delayed by the appeal of the dissatisfied and unsuccessful party to the High Court of Appeal, a measure which this Court would be slow to injoin any party from recurring to, it seems preferable for this Court to take the enquiry into its own hands. Issues have been granted and tried here before, and the Court therefore directs that it should be so done now.—(Per *The Supreme Court of Judicature.*)

Cuylenberg, vs. De Vos.

Trustee deed, and rights of surviving spouse.

In this case, the complainant Mrs. M. A. Daniels, widow of W. H. Van Cuylenberg, prefers a prayer addressed to the equitable jurisdiction of this Court, requiring that a payment may be made to her by trustees of certain monies in them vested for her use and benefit, and which, her husband being dead, she now lays claim to. The surviving trustee appears, and is ready to do whatsoever can in justice be required, desiring however to take the opinion of the Court, whether his trust, notwithstanding the death of the husband, can be considered as executed and expired. There is no particular difficulty in the case, further than that which arises from the deed being drawn in an English form, and with the usual intervention, according to English practice, of trustees. The form of the deed of settlement is however, the Court is informed by its officers, not frequent upon its records, and may therefore require some little attention to be paid to it.

The legal point arising out of it is clear. Mrs. Daniels, widow of Van Cuylenberg, is not altogether borne out by law in the assertion, that the indenture does not speak of any provision for the children of the marriage, and that therefore the whole sum vested in the trustees is hers. It is contended by the counsel of the trustees that this is a *casus omissus*, and several not unapt cases are cited to prove, that where community of property is in an ante-nuptial contract excluded, each

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contracting party takes his or her own admitted property, but in omitted cases, that is, when the marriage is dissolved (as it is by the death of one of the parties), it becomes an omitted or unmentioned case, and then such should be decided not according to the common law, which excludes community of property, but according to the law of this country, by which community of property is established and introduced; the contracting parties are not to be presumed to have departed from the common law of the country, further than they have already expressed in the ante-nuptial contract itself.

It does not however appear to the Court necessary to give effect to this reasoning to the extent asked of its being a *casus omissus*, because it seems to the Court that children of the marriage are contemplated by the terms of the deed itself: it is provided that in case the husband outlive the widow, he shall take a life interest in the monies secured by the deed, which shall upon his death devolve upon the child or children of the marriage with Maria Daniels. Now, although the sum secured to the trustees was undoubtedly the property of the father of Maria Daniels, and by him meant to be secured for the use and benefit of his daughter, not subject to the control of her husband, yet an equity must be taken to have meant to be reserved by this deed in favour of the children of the marriage (should there be any) outliving that daughter, the wife of Henry Van Cuylenberg. The implication, the Court thinks, is plain and unavoidable: and indeed so sensible is the complainant herself of what is due to the interest of the child, that she herself makes a proposition, as to the provision to be made for him. The second chap. of the second book, *Questionum Juris Privati* of President Bynkershoek has many useful observations referrable to this subject.

The Court is of opinion, that this cannot be considered as merely optional on her part; it thinks itself bound to decree that the trust is not yet fulfilled and executed, but that the child surviving of the marriage is entitled to an half share of the trust fund: the Court, further, referring it to the master to consider and examine the accounts rendered by the trustee, and to report, when and how such half share can best be appropriated to the use and benefit of such child, and then a transfer be made to the complainant, Mr. Van Cuylenberg, of the remaining half.—(Per *The Supreme Court of Judicature.*)

 1831. August, 4.

A deed conditioning payment of alimony to a wife, *during* the pendency of a suit for divorce, and also *afterwards* so long as the promovent shall remain in the Civil Service, is valid and binding, even though the charge of adultery has been proved against her, and divorce granted in consequence thereof.

This case is not without its difficulties, and it will be necessary especially to consider the manner and form, in which it is brought before this tribunal, so that a safe conclusion may be arrived at.

The plaintiffs suing, as the trustees of a female, (who, though now entitled to another name, is unfortunately too well known to the general records of the Court), seek to recover here on her behalf certain arrears due and unpaid, upon a deed executed by the late John Wallbeoff, her husband. The trustees have performed no more than their strict duty in allowing this action to be brought, as, on the other hand, the executors of the last will of Mr. Wallbeoff have done no more than theirs' in submitting to the Court such objections as occur to them, why these arrears under the circumstances should not be recovered against them: they have done no more than what probably, were he living, Mr. Wallbeoff would have done himself. They have indeed pleaded that the bond is not his, probably through precaution and in compliance with form, and further they have said that it is void for want of a consideration? The bond is in existence and *is his*: and the first question therefore which arises is,—is there not upon the face of it a consideration: it seems to the Court, there *is*.

This action is instituted upon a bond drawn in an English form, and is brought before the Court in its ordinary course of civil jurisdiction. The indenture itself recites that a suit was then pending in the Supreme Court here, on its ecclesiastical side, at the promotion of him, the said John Wallbeoff against the said Jane, for a divorce *a mensâ et thoro*; that by an order of the said Court, alimony was decreed to the said Jane, during the pendency of the suit, and it agrees to the continuance of the payment of two hundred pounds per annum, as or in lieu of the said alimony, through the intermediation of trustees, so long as he, the said Wallbeoff, remains in the Civil Service of this Island. There are other covenants, unnecessary to be gone into now, and also there is the common and usual covenant, that the trustees shall be at liberty to deduct out of this annual allowance all debts, payments, &c., which the said Wallbeoff shall have been made, or become chargeable to, by suit or otherwise, through the expenditure of the said Jane or by her incurred; and finally, that she shall be at liberty to go, reside, and be at such place or places, and with such family and families relations, friends and others, as she, the said Jane, shall from time to time see fit.

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Now, on the face of this, it is difficult to affirm, that a sufficient consideration does not appear: the form and incidents of the deed are in fact such, as have long been in use in England, and this Court is in possession of no case, in which bonds of this nature have *at law* been determined to be void or unavailable. It has long ago been declared, that from the incapacity of a married woman to contract, or to possess personal property which may be the subject of a contract, men and their wives desirous of living separate, have found it necessary to have recourse to the intervention of trustees, in whom the property, of which it is intended she shall have the disposition, may vest uncontrolled by the rights of the husband; and with whom he may contract for her benefit. Of such trusts Courts of equity alone can take notice: and to those Courts reference must be made.

But there is another plea put in by the defendants; namely, that they ought not to be charged with any debt accruing under this indenture or writing, because since the day of the date thereof, and during the life time of the said John Wallbeoff, she the said Jane was living in open adultery. To this the trustees, with the assent, as it should seem, of the late Jane Wallbeoff, now living, answer, though it be so, "the allowance due under the bond is still due and must be paid."

Now, administering law in a Court, in which the embers, to say the least, of Dutch Jurisprudence are yet unextinguished, and in accordance with which system adultery is an actual crime of magnitude and punishable by the civil Magistrate, this confession cannot but sound otherwise than as a startling one. It surely never can be meant by the defendants that the words licensing a choice of residence, were ever designed by Mr. Wallbeoff to sanction a routine life such as that which is herein tacitly undenied, and the verification of which is offered by the executors, defendants. There are in fact circumstances attaching to this avowal, which are too notorious not to be known by the Court, as well as to the public, which must to every mind carry conviction, that such extended indulgence in criminality never could be contemplated by Mr. Wallbeoff. It may be presumed, therefore, that the trustees, anxious for the pecuniary interest of this unhappy lady, have of themselves risked the hazardous question of law. And the Court is hereupon called to decide, does this bond stand good, even though the course of living of this female should have been as averred.

Considerations of a moral kind, and of general policy, have been strongly, but not improperly, pressed upon the Court: it is perhaps to be regretted that any agreements whatsoever

should have been holden valid, the tendency of which is to unhallow the marriage contract, and render smooth and easy the separation of husband and wife. 1832. August, 4.

English law however has dealt gently with bonds of separation: and, on the whole, the Court is of opinion, that the arrear due and demanded must be paid, but without interest, and each party paying their own costs.

Whether, if the judgment of the Court had been required in another direction, either by reference to its equitable, or to its capacity of ecclesiastical jurisdiction, a different result would not have ensued, it may be well to suggest, but wrong to do more than suggest. Of such a case as this, the Court trusts that few exemplifications will occur. The present determination is that of law, founded, inasmuch as the Court knows not what other reasoning it can apply to the case, upon the doctrine and usage of English Law in like cases. It holds the bond to be good, and directs the arrears claimed to be paid.—(Per *The Supreme Court of Judicature.*)

1833.

March, 6.

Present:—Marshall, C. J. and Rough, J. 1833. March, 6.

Moore, vs. Wolffe.

This action is brought to recover compensation in damages, for injury sustained by the plaintiff from the seduction of his wife. The first question to be considered therefore is, whether the marriage of the plaintiff has been sufficienlty proved. Because if that fact be not established, the plaintiff cannot be said to have sustained any injury, any at least which the law recognises. The only witness who speaks directly to this fact is a Mr. Hamilton, who has been examined on the continent of India on interrogatories. He describes himself as the brother of Mrs. Moore, and speaks positively to her having been married to the plaintiff in 1815; and he even specifies the place in Ireland where the marriage took place, and the name of the clergyman who solemnized it. But from the terms in which his answer is expressed, it does not appear whether he was present at the marriage or not; and as from his present age he must have been very young at the time, it is most probable that he was not, and that he has therefore

1. In an action for damages for seducing one's wife, what proof of marriage is necessary.

2. The principle upon which such damages are to be assessed, depends on the circumstances of aggravation or mitigation, arising out of the conduct or situation of

1833. March, 6.

the plaintiff, his wife, or the defendant.

only heard of it from others. This evidence therefore, corroborated by reputation and cohabitation, would scarcely have been as satisfactory as the defendant would have a right to expect. But the defendant himself, in his answer to the action, fully admits the fact of the marriage; and he does so for the purpose of bringing recriminating accusations against the plaintiff. It is impossible then to say that, as against the defendant, which is the only point of view in which the Court has now to consider the question, any further proof can be necessary. The distinction which has been made by the Courts in England on this subject, is between the admission of a bare *reputation* of marriage, and an admission of the *fact* of marriage itself. Now here, the defendant admits the fact of the marriage itself, by his own deliberate and recorded defence to the action.

This point then being, as we think, satisfactorily established, the next question is, has the criminal connection between the defendant and the plaintiff's wife been sufficiently proved? On this point very few words will suffice; for I seldom recollect to have witnessed or heard of a case of this nature, proved by evidence so disgustingly clear and conclusive as the present. It has indeed been attempted to shake the evidence of one of the principal witnesses, Mary Champion, by shewing that the account she gave in Court of her own sobriety was rather over-rated. However this may be, we do not consider her evidence, as regards the principal matter, to be at all shaken, and besides she is corroborated by the testimony of her husband, and both of them by the conduct of the guilty parties after the discovery was made.

The third and last question therefore is, what are the damages which the Court, invested as we are with the functions of jury as well as of judges, is called upon to assess. And this question must depend on the circumstances of aggravation on the one hand, or of mitigation on the other, which may present themselves; and these, whether arising out of the conduct or situation of the plaintiff, or of his wife, or of the defendant.

First, with respect to the plaintiff. The defendant, indeed, in his answer, ventures to accuse the plaintiff of the grossest carelessness and misconduct towards his wife. He takes upon himself to say in the first place that the plaintiff entertained no affection for his wife. Now, it is scarcely possible to imagine a stronger body of evidence than has been given in the present case, to prove a strong attachment, nay the most devoted tenderness, in a husband towards his wife. And so far does he appear to have carried this feeling of affection, that even after the discovery of her misconduct, and his con-

sequent determination to separate himself from her, he shewed the utmost solicitude to provide her with a respectable home and suitable support, so as to prevent the necessity of her undergoing the further degradation of receiving those benefits at the hands of her seducer. The defendant has then the temerity to allege that the plaintiff had seduced his wife before marriage, and that it therefore was with reluctance that he had consented to unite himself with her. Of this he has not attempted to give the slightest proof. His next assertion, but equally unsupported by any evidence, is that the plaintiff had attempted to have an improper intercourse with a female servant of his wife. Lastly, he alleges that the plaintiff had entertained certain suspicion of his wife's misconduct during her voyage to this country, and that he had on that account ceased to cohabit with her. It does appear from the evidence of Mr. Williams, that the plaintiff considered the attention shewn by the Captain of the ship to Mrs. Moore were too marked, and that hence had originated some of those idle rumours so common under similar circumstances, and it seems that Mr. Williams himself was deputed by the plaintiff to require a discontinuance of the Captain's attentions. But it does not appear that there was any thing like criminality in those attentions, or that what passed on board ship had any effect either in alienating the affections of the plaintiff from his wife, or in inducing him to separate himself from her bed, or even in preventing him from paying her the greatest attention during the passage, which Mr. Williams states that he did. As far therefore as the plaintiff is concerned, his conduct as a husband appears to have been perfectly irreprehensible and exemplary; nor do we see in that conduct the least reason for reducing the damages from the amount sought to be received. 1833. March 6.

With respect to the unfortunate woman who forms the subject of this inquiry, circumstances have certainly appeared, which, though they in no way reflect discredit on the plaintiff himself, yet must necessarily diminish the value of that society for the loss of which he now seeks for compensation. It has been stated by Mrs. Champion that Mrs. Moore entertained no affection for her husband, and that she was in the habit of expressing herself to that effect, at a time antecedent to her acquaintance with the defendant, and when therefore that want of affection could not be attributed to undue influence on *his* part. It has also been shewn that Mrs. Moore had contracted habits of intemperance, which though they furnish another proof of the excellence and forbearance of the plaintiff's disposition, in the efforts which he made to reclaim her from

1833. March, 6.

In cases of crim. con., letters between the parties cannot be received, unless they clearly appear to have been written before the commencement of the adulterous intercourse.

that vice, still it must be admitted do very much diminish the loss he has sustained. It may be proper to mention here the letters of Mrs. Moore, which were tendered in evidence by the defendant, for the purpose of shewing that she had made the first advances, and which the Court rejected at the trial. Upon more mature consideration, we are quite satisfied that our rejection of those letters was right. The first of them in order of date was of second of August 1832. Now, it has been proved that, about three months previously to the night when the ultimate discovery took place, which was on the 22nd of November 1832, an act of indecent familiarity was observed between those two person, which it is scarcely possible that any female, in the situation of a gentlewoman, would have permitted, who had not already surrendered her virtue to the man to whom such a liberty was allowed. To have admitted this letter therefore, and *a fortiori* those of a subsequent date in evidence, would have been in violation of the rule which has been established in cases of this nature in England, namely that no such letters can be received, which do not clearly appear to have been written before the commencement of the adulterous intercourse.

As regards the defendant himself, we see many circumstances of aggravation in his conduct, but none whatever of mitigation. It is true he was not in habits of great intimacy with the plaintiff; but he was occasionally received as a guest at the plaintiffs table, and that of itself is an aggravation of the injury done to the plaintiff. When discovered concealed in the house, instead of shewing marks of contrition, instead of being covered with shame, at the disgraceful situation in which he had been found, he ventured to lift his hand against the plaintiff, thus adding the grossest insult to the bitter injury which he had inflicted upon him. Then with respect to his subsequent conduct: it has been somewhat ingeniously attempted to shew, from the behaviour of the defendant subsequently to the 22nd of November, that Mrs. Moore had forced herself upon him, and that he had been an unwilling participator in her misconduct. We see in his demeanour a great deal of selfish apprehension lest his own prospects might be injured by the discovery; but we look in vain for any thing like that remorse or compunction which ought to have actuated him under such circumstances, and which should have induced him to make such poor reparation as might still be in his power, towards the man whom he had injured, and the woman whom he had deprived of all that makes life valuable. The expression indeed mentioned by Captain Stewart, as having been used by the defendant with respect to this unfortunate

person, is such as one could scarcely believe any man would have allowed to escape him under such circumstances. The nature of the defence which has been put upon the record would no doubt, if this case were before a jury, tend very materially to swell the measure of damages, and it *must* be considered as a great aggravation of the injury, that the plaintiff should be thus deliberately charged with various acts of gross misconduct, for which accusations there does not appear to have been the faintest shadow of foundation. And if this does not operate with us in our assessment of the damages, it is because we wish calmly and dispassionately to consider alone that injury for which alone the action is brought ; and because it is impossible for us to inquire what proportion of this defence is attributable to the defendant himself, what proportion to his Counsel, and what to the officiousness of wrong-headed friends. The only ground upon which we feel ourselves justified in reducing the damages (besides those to which we have alluded as affecting the plaintiff's wife) is that of the pecuniary circumstances of the defendant. It has been proved that all his steps in the army have been purchased, and that therefore, by the rule of the service, he would be entitled to sell them again, and it has also been proved that the purchase money of his Lieut.-colonelcy has been "lodged," as it is termed, by his uncle. With respect to this latter circumstance, it is obvious that this money cannot be considered as the defendants property. Considering therefore that the defendant has not been proved to be worth any thing besides his commission ; and considering that no amount of damages would make amends to the plaintiff for the injury he has sustained, we think that we shall meet the justice of the case, as far as that can be met, by assessing the damages at £500, with costs.—(Per *The Supreme Court of Judicature*).

APPENDIX.

I.

May 11, 1822.

Present :—GIFFARD, C. J.

In re *Forbes*.

At the opening of the Criminal Sessions, the Magistrates of the District of Colombo attending, the Advocate Fiscal offered to the notice of the Court the case of a person named Babona, committed by the Sitting Magistrate of Colombo, until he should find securities for his good behaviour, himself in Rds. 100, and two other persons in Rds. 50 each. He had, he said, looked over the Magistrate's Diary, and it did not appear to him that there was any evidence given before him which could warrant this order. Mr. Forbes being present admitted that there was no evidence against the man, but stated that he knew him to be a person of very bad character.

It appearing to the Court, upon consulting the Diary that the statement of the Advocate Fiscal was fully supported, and the admission of the Magistrate himself corroborating that statement, the Regulation No. 8 of 1812 was read :—

And whereas it is necessary to regulate the powers of the Provincial Judges and other inferior Magistrates, in requiring securities for good behaviour: It is therefore enacted that no such Judge or Magistrate shall have power by sentence or otherwise to demand securities for a longer term than twelve months, and every such sentence or order shall be specially entered in the Diary of the Magistrate, for the information of the Supreme Court, which is hereby authorised to annul such sentence or order, or vary the same, as to the said Supreme Court shall appear fitting.

It was directed that the order (which includes another person with Babona, and on the same grounds) should be annulled.

On Monday, May 13th, the Registrar received a letter from Mr. Forbes, which he laid before the Judges, in consequence of which Mr. Forbes was directed to attend at the sitting of the Court on Tuesday.

May, 14.

Mr. Forbes attended according to order.

Chief Justice :—Mr. Forbes, it is with regret, perfectly unfeigned that the Court feels itself bound to call upon you in consequence of a letter which you have addressed to the Registrar. Feeling, as we do, individually and personally towards you, we would gladly have avoided taking this course. Our knowledge of you, as a gentleman and as a Magistrate, has always hitherto been such as to demand and receive our unqualified approbation, and could we consult our own regrets only, the present scene might have been unnecessary; but we have a

higher duty from which we cannot be permitted to shrink—our duty to the Court in which we preside. By an official letter from your office of Magistrate, written in the hand of a clerk and addressed to the officer of this Court, you seem to have studiously placed upon our records, with as much publicity as possible, a most offensive paper, a paper which no man can read without saying that it purports to be designedly offensive. I will read the letter:—

Sitting Magistrate's Office,
Colombo, 13th May 1822.

Sir,

It having been the pleasure of the Supreme Court, on the representation of His Majesty's Advocate Fiscal, to quash the proceedings in the case of the prisoners *Babona* and *Pitche*, I beg leave to submit for the consideration of the Supreme Court the case of the prisoner Kottegoddegey Baba, a greater vagabond, if possible, than Babona, but being committed, as I think, on a slight or slighter grounds than Pitche, I therefore feel myself called upon to intercede in his behalf, and obtain his release from the jail, should my suggestion be approved.

I have the honor to be, Sir,
Your most obedient servant,
J. G. FORBES,
S. M.

For this you are now called to answer. We cannot permit it to remain in our records without severe animadversion. But the Court is not willing to press you, but you shall have time, until our rising, to consider what step you will take, and how far you will offer anything in explanation or extenuation of your conduct.

Mr. Forbes retired.

After the business of the Criminal Session had teminated, Mr. Forbes was sent for. The Chief Justice then addressed him:—

Mr. Forbes, I need not repeat how anxiously the Court wishes to terminate this matter in the way which would be most gratifying to our personal feelings. We shall require your answer upon oath to our questions, in case it should be necessary to go that length, but we would willingly indulge ourselves in making an offer by which you may be extricated from unpleasant consequences. I will again read that letter [letter read]. As the letter now stands on our records, we must place along with it some vindication of the Court against the nsult it offers. You may, however, by disavowing any intention to offer insult, and by desiring to withdraw the letter, relieve us from this unpleasant necessity.

Mr Forbes :—I did not intend any insult, but I cannot withdraw the letter.

Chief Justice :—Then, Sir, it will be necessary to take your examination upon oath. [Mr. Forbes was sworn.]

Chief Justice:—As matters now stand your examination must proceed upon oath: you may say what you please, still recollecting that you are on oath, in answer to our questions.

Chief Justice :—Is that your letter?

Mr. Forbes :—It is my signature.

Chief Justice :—Was the letter written by your direction and sent by your authority?

Mr. Forbes :—It was. I did not wish to insult the Court but to refer to a case which had been overlooked by the Advocate Fiscal.

Chief Justice :—You perceive that this letter contains expressions which I have pointed out as highly offensive to the Court.

Mr. Forbes :—I did not intend to insult the Court.

Chief Justice :—We ask then again whether you wish to withdraw the letter?

Mr. Forbes :—I have already given my answer. I disavow the supposed insult, but I do not wish to withdraw the letter.

Chief Justice :—Let us be fully understood, our object is that as the letter must otherwise remain on our records, we wish to give you an opportunity of withdrawing it.

Mr. Forbes :—I have answered, my Lord.

Chief Justice :—The Court wishes to give Mr. Forbes still another opportunity of withdrawing a letter, which, in its opinion, contains an insult on the face of it, in order that we may not be obliged to keep it on our records.

Mr. Forbes is therefore again asked if he wishes to withdraw it.

Mr. Forbes :—I have said. No, my Lord.

Chief Justice:—Let Mr. Forbes sign his answer. [This being done]—*Chief Justice*: Mr. Forbes, it now becomes our painful duty to do that which we have anxiously struggled to avoid. By your refusal to withdraw this letter you obviously avow your wish to record and perpetuate the insult which you have offered to the Court: you have been mercifully offered an indulgence which you have rejected. It is vain to say that your disavowal of an intention to insult it can avail, when your conduct evinces an anxiety to maintain and support that insult. But we cannot, consistently with our duty to the Court and the public, suffer such a daring attempt to beard us on our own records, without shewing at the same time that we had the courage and power to punish such an attempt. Had this been the act of an head-strong blockhead whose dulness could devise no readier road to consequence than by offering an insult to get into a contest with the Supreme Court, we should perhaps have disappointed his stupid ambition by treating his effort with contempt; but when a deliberate insult is offered and persevered in by a gentleman well aware of what he is doing and fully capable of appreciating the consequences, we must, as a Court, feel very differently, and treat such an attack with the more firmness, as the consequences might be more mischievous, were such an example to pass with impunity.

It is obvious, Sir, that this is on your part a struggle to set up the independence of your office against the salutary control over it with which the Crown and the Legislature has invested the Supreme Court. The necessities of this country have given to the inferior Magistrates very extraordinary powers, but the wisdom of the Legislature has, as far as could be foreseen, limited the exercise of those powers, so as to render them as little liable as possible to abuse; accordingly, though Magistrates have power to fine, to inflict corporal punishment and imprisonment, all these punishments are restrained within certain limitations. The power of demanding securities of the peace was indeed originally left at large, and what was the consequence? Magistrates, under the disingenuous pretext of requiring security, exacted impossible bail and imprisoned people for years. On my arrival in this

country, I found one poor wretch, who had been toiling in the salt lakes at Hambantotte for five years, under such a committal from a Magistrate whose actual power of imprisonment was limited to two months.

Upon the representation then made, it pleased the Government to abridge this power to one year, and to subject even that abridged power to the particular control and revision of this Court which has authority to alter or even annul such a sentence altogether.

It is for the exercise of that control in an instance where according to your own admission, there was no evidence to justify the sentence, that you have been pleased to take offence at this Court, and have suffered yourself to be betrayed into the intemperate conduct which I must again say I deeply regret. But we must teach you and other Magistrates that this Court is not to be insulted or intimidated in the discharge of its duty, and our order is that you pay a fine of three hundred Rixdollars for this contempt and be imprisoned until the fine be paid.

II.

July 7, 1823.

In re *Bennet.*

Certain rumours so generally circulated that they could not fail to reach the Court, induced me to direct an enquiry concerning your conduct in this place on Friday the 24th of last month.

It appears by the concurrent testimony of several gentlemen present, that you thought fit to indulge yourself in most improper language against His Majesty's Advocate Fiscal.

It had been the professional duty of that gentleman to enforce against you a proceeding doubtless very disagreeable to your feelings, and I have as little doubt, equally to him; for I had observed, and with no small gratification, that in doing so unpleasant a duty he expressed himself in a manner so guarded and so considerate, so moderate and so forbearing as to deserve my most entire approbation.

It appears that this moderation and forbearance found no corresponding feeling in you, but that immediately upon the judge leaving the bench, and while he could not have yet reached his chamber, you broke out in the reprehensible conduct which I have noticed. I shall not disgust myself or my hearers by a repetition of the gross and vulgar ribaldry you chose to employ, but I shall again express my approbation of the continued forbearance of the Advocate Fiscal and of the proper disregard with which he treated your virulence. But I think it necessary to explain to you and to this highly respectable audience, how it appears that no proceeding takes place on this subject and that you now escape without punishment.

It had at first occurred to me that this conduct might be treated as a contempt of the Court itself. It was only not sitting; and this

construction I know prevailed in other cases. But the Court is careful not to inflict penalty where there can be a doubt of its being fully authorized, and this course has not been adopted.

The only other course was to proceed by information filed by the very officer who was the object of your misconduct, but he, with a feeling which I must respect, although I cannot wholly justify it, declines to make use of his official power to punish an offence against himself.

It is then, to the continued moderation and forbearance of that very officer that you now owe your impunity.

But I must warn you, Mr. Bennet, that you may not be always thus protected, and that should your offence be repeated in any manner whatever, it will be my duty to call upon His Majesty's Government to appoint an Advocate Fiscal *pro tempore* for the very purpose of bringing your behaviour under the regular and public discussion of a Court and a jury; and with this warning, I release you from further attendance.

III.

[See *ante*, p. 158]

Resolution of the States of Holland and North Holland, determining that the States claiming money from any person, whose estate has become insolvent, shall have no better right than other creditors, dated 25th February 1678.

The Pensionary of the Court having reported the opinion and advice of their High Mighty Commissioners, who in compliance with their Commissorial Resolution of the 11th Instant February, have examined the Missive of their High Mighty Commissioned Councillors of North Holland and of the Northern Districts, written at Horn the 6th of January last, containing their opinion and advice on the proposition submitted to the Council by the representatives of the city of Horn in the name and in behalf of their principals tending to shew that it has appeared by the closed account of the estate of Reynier Languvagen, late Collector of the revenue of the city of Horn and its dependencies, that his effects are not sufficient to pay the balance appearing by the said account, much less his other creditors, and moreover that the debts of the said estate are of that nature that unavoidably the right of preference must be discussed, which ere long ought to have been done, unless their High Mighty Commissioned Councillors of North Holland, and of the Northern District were of opinion that the right of preference and the accessory thereof ought to have been discussed before the Scheepen as the competent Judges, and the proceeds of the estate deposited in the hands of the Receiver (Depositary) to be distributed by him by order of their High Mightiness, according to the decree of preference, but the judges of the said city on the contrary were of opinion that in case they are required to decide the right between the creditors of an insolvent estate, that then and in

that case the whole management of the estate without any distinction, whosoever the creditors may be, ought to remain with and be vested in the Scheepen, to receive and disburse the money belonging to the insolvent estate, according to the custom observed in all Courts, as it has been practised, as they believe at Dort, with respect to the insolvent estate of the Collector Hogevuns; that it appeared also to the said judges that in case the whole estate be not managed by them and the whole proceeds thereof be not received and disbursed according to the old custom of the said city, that in that case, it would be very difficult as is alleged by them to compel the purchasers of the immoveable properties to the payment of their respecttve purchase amount, there being none but them that was or could be qualified to grant them legal and proper acquittances, which is only practised by the Burgermasters, on the securities furnished by the persons receiving the money. And whereas the opinion given on both sides, has rendered it impossible to bring the affairs of the said estate to a close; therefore the representatives have found themselves impelled to solicit their High Mightiness to command the Commissioned Judges to desist themselves from interfering any further with the money and estates of the said late Collector Languvagen, and to deliver over whatever might have been received by them or by their order to the Scheepen to be by them paid to those who, after the decision with reference to the preference, shall appear to be entitled to, and that if their principals be of intention to make any alteration in cases of similar nature as the present, that it may be done in future, provided that in that case all the members of the States be placed on the same footing. The same Commissioned Judges of North Holland and the Northern Districts asserted, on the said proposition, that after the balance of the account of the said Languvagen was ascertained and the ordinary time for the sale of the immovable property having come, after the required notices of sale of the immovable and other property found in the aforesaid estate have been affixed at the usual places, the said sale has been held by them publicly in the aforesaid city on the 14th January 1677, without any the least objection or opposition on the part of the Burgermasters or Scheepen of the aforesaid city. That subsequently it appeared to the Collector of the Revenue of that place, when he was about to collect the instalments of the account due for the property sold by their orders, that some of the purchasers had raised difficulties to make the said payments, on the ground of seizure of the said purchase money by several of the creditors of the said Languvagen; that the recovery having consequently been delayed for sometime; one of the Secretaries of the said city intimated to them on the 21st October last, past, in the name and on behalf of the said Burgermasters under sufficient assurances that in case the said Commissioned Judges should resolve to decide the right of preference that no objection would be made with respect to the consigning of the money, but that the said secretary, had shortly after informed them that the said Bailiff, Burgermaster and Scheepen, having met together on the subject of deciding the said right of preference, said that they neither could nor would proceed with it before the money is deposited, and that the said Commissioned Judges have never given it as their opinion that the said right of preference should not be decided by the Scheepen, but that they, on the first proposition of the said Secretary have so far expressed

their opinion to obviate all dispute, but as those of the said Court were of a different opinion, and the said case was consequently submitted to their High Mightiness, hence they ought now to pronounce and decide according as to what shall be enacted by his High Mightiness, and that the right of preference ought to be decided by the said Sheepen, and that the consigning of the money with the accessory thereof is not applicable to this case, because the depositing of money was chiefly introduced for the security and safety of the creditors, in order that they, in case of failure of the appointed curator or sequestor of an insolvent estate, should not be deprived of the money which might be adjudged to them, and that the said creditors in this respect could not have been better secured or protected, even if the money was brought and deposited in the treasury of their High Mightiness, that the said property was sold by them, but not by the said Court, and that the part of the money has already been paid to the treasury of their High Mightiness, and therefore they do not consider that the depositing of the money, much less the appointment of the curator, to be applicable in this case or that the proceeding should thereby be prevented, because they have already done the duty of a curator and the States are sufficiently solvent to pay over the amount of the decree; and with respect to the objection contained in the said proposition, that the purchasers of the property could with difficulty be compelled to the payment of the purchase money, because no one was qualified to pass and give sufficient transfer and receipts, the said Commissioned Judges seemed to be of opinion that no difficultys exist in this respect, and that they or others in their names have already passed a transfer for a considerable sum in the name of the Chief Magistrate of the aforesaid city at his request. Wherefore their High Mightiness having considered, have thought fit to *enact and declare* as they do enact and declare by this presents, that in case of insolvency of any estate of which the States might be one amongst other creditors, that the said States cannot be considered otherwise than *in privatorum loco in all judicial acts done with respect to the said estate*, and therefore the ordinary judge of the place, when the insolvency shall take place, must, with the concurrence of the creditors, allow the appointment of a curator for the administration and sale of the property, depositing of money, *the proceeding about the right of preference*, the payment of money to whom it shall be adjudged with all the accessories depending on the *judicium* aforesaid, and that the said Commissioned Judges of North Holland and the northern district shall have to regulate themselves according to these presents: with respect to the insolvent estate of the said collector, Languvagen.

Agrees with the said Resolution.

Translated by *P. J. Giffening*, Translator.

Report of Lieutenant-Colonel *Colebrooke*, one of His Majesty's Commissioners of Inquiry, upon the Administration of the Government of Ceylon; dated 24th December 1831.

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To The Right Honourable Viscount Goderich, one of His Majesty's Principal Secretaries of State.

London, 24th December, 1831.

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—
Colebrooke's Report.

My Lord,—In the several communications made by me from Ceylon, your Lordship will have been generally apprised of the proceedings of the Commission of Inquiry in that Island, and from the peculiar institutions of the Colony, differing as they do from those of any other possession of the Crown, it may serve to elucidate the subjects on which I am about to report, to explain shortly the course adopted in the prosecution of the inquiry. After my arrival at Colombo, and the publication of His Majesty's Commission in the English, Cingalese and Malabar languages, numerous representations, in the form of petitions, were addressed to me from different parts of the Island, and several of them were signed by the inhabitants of towns, districts and villages, and by the people of particular classes or castes, with a request that they might be laid before His Majesty. The number of these petitions, and the great variety of topics to which they referred, precluded the possibility of inquiring into the merits of each particular statement, even if my instructions had authorized me to do so; but

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I considered that the inhabitants were entitled to attention on subjects deemed by them of importance to their own interests. Where individual complaints had been addressed to the Governor, the practice had been to inquire into the grounds of the complaint through the local authorities, and a record of these investigations, with the Governor's decisions, was kept in the office of the Secretary to Government. Where general representations had been made against the laws or regulations of the Island, they were noticed, or not, according to the views that the Governor might take of the subject. There appeared to be no instance, in which the natives had transmitted their complaints to His Majesty's Government. but there was no existing impediment to their doing so. The course therefore adopted by me was to avail myself of the information contained in the petitions in framing a series of interrogatories on all the general topics referred to, and which I addressed to the civil officers of Government, and the judicial functionaries throughout the Island. From the multiplicity of the subjects brought to my notice, I found it convenient to divide the inquiry into two branches, the one comprehending the civil Government and institutions of the country, its revenues, and all general and statistical information relating to it; the other specifically referring to the laws and judicial establishments. From the frequent reference to the same persons on these several subjects of inquiry, and from their practical connection in many instances, it has been impossible to keep them entirely distinct from each other; and in treating of them apart, a general reference will be made to all the sources of information acquired, where confirmed by my own observation.

Before I closed my proceedings in the Island, I entered into correspondence with the Governor, in order to ascertain his opinions, and to state to him my own, on several most material points relating to the administration of the Government, the establishments and finance of the Island. Although my own opinion had been formed on most of the principal questions which had arisen out of my inquiries into the laws and judicial institutions, I was induced to reserve them, as Mr. Cameron had but recently joined the Commission, and was engaged in completing the inquiries I had pursued. In referring to the correspondence in question, it will be observed that my opinions have not always coincided with those of Sir Edward Barnes; and it is therefore satisfactory to me that he has had an opportunity of explaining to your Lordship the grounds of his own, and of stating his objections to those which I have formed after a full investigation of the subject.

In these views I am supported by the opinions of some of the most intelligent and experienced members of the public service, and of other persons who have been long resident in the Island.

These preliminary observations have been called for under the responsibility attached to me for the conduct of the inquiry. It was planned and conducted by me nearly to a close before the arrival of my colleague, and he has returned to this country on my certificate, that the evidence I had collected was sufficient.

In the course of my proceedings I have had occasion to recur to the experience I had acquired during my former residence in India. Although administered by the Crown, the Island of Ceylon was originally a Hindu province, and from not having been subject to the

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inroads of the Mahomedans, it offers at this day the most perfect example to be met with of the ancient system of Hindu Government. A short analysis, therefore, of the system may be useful, not only with reference to the particular interests of Ceylon, but in elucidation of some questions of considerable importance in relation to the British settlements in India.

The situation and extent of Ceylon, its climate and resources, and the character and condition of its inhabitants, have been described in various publications; but from the nature of the information open to the Commission, and the more accurate knowledge of the country which has been recently acquired, some general observations on these heads may be found useful. Since the acquisition of the Kandyan territory, the country has been explored by several intelligent officers, and although many parts of it are still but imperfectly known, its general character and peculiarities are better understood than at any former period.

The Island, being open to the influence of the two monsoons which alternately prevail in the Indian seas, includes a greater variety of climate than is to be found in any territory of equal extent on the continent of India (*a*).

The eastern division, open to the north-east monsoon, partakes of the climate of the coast of Coromandel, which is hot and dry; and the weastern division, open to the south-west monsoon, of that of the Malabar coast, which is temperate and humid. The north-easterly winds, although producing rains, are drier than those coming from the south-west, and give an arid appearance to the country over which they blow, which is contrasted with the luxuriant verdure of the southern and western districts throughout the greater part of the year. The driest divisions are those which are situated between the range of the two monsoons, partaking slightly of the influence of both. The high mountains of the interior or Kandyan country do not range in any direction to the sea-coast, but are generally retired from it 30 or 40 miles, descending in some parts precipitously into the plains. There is a continuous range of low hills extending to the southern coast; and at the base of the mountains a tract of country considerably elevated above the sea, in which some large rivers take their rise. The Ginderah and Walawe are the principal ones. To the eastward, northward and westward, the country is low and flat. The highest mountain of the interior has been ascertained to be more than 7,000 feet above the level of the sea, and forms the centre of the range of highland country of extremely irregular surface, and adapted to most of the productions of temperate regions, the temperature being lower than in the plains. The country being intersected by deep and often impassable ravines, and clothed with thick jungle or forest, the com-

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(*a*) The N. E. monsoon prevails from November to February, and the S. W. monsoon from April to Setember. The intervening or equinoctial months of March and October are those in which the variable winds and calms prevail. The seasons are subject to fluctuation, being sometimes earlier or later than the periods mentioned.

munications are rendered extremely difficult. Under the Kandyan Government, the opening of roads was prohibited, and the passes were strictly guarded. Narrow footpaths were made, by which men on foot could singly pass, climbing over rocks and through the thickets. In thus providing for the defence of the country, its improvement was necessarily retarded; and from the little intercourse that subsisted with the maritime provinces, the habits and institutions of the people were of the most simple and primitive kind, exhibiting curious memorials of their social condition in very remote ages. Several fine rivers and streams rise in the mountains, and take their course to the sea on either side of the Island, but in traversing the plains their currents become languid. During the rains they overflow their banks, and on the western side flood the country, but they rarely open channels to the sea which would render them navigable, except for boats and coasting-vessels. Supplied by the mountain torrents, some of these rivers are calculated to afford in the dry seasons an unfailing resource to those parts of the low country where the rains are precarious, and where the fertility of the land has at all times more depended on irrigation from tanks and water courses. It is accordingly not unusual to see, in districts now deserted and overgrown with jungle, the remains of such works by which the waters were conducted and distributed.

The "Kalani Ganga" is navigable for boats about 50 miles from Colombo to Ruanwelle, and is the medium of much intercourse, but higher up it is the impeded by cataracts. The same observation is applicable to the "Mahavilleganga," which takes an easterly course from Kandy to Trincomalee, and also to some other rivers which are navigable for the boats and rafts used in conveying produce during a great part of the year. Those rivers which circulate through the districts to the eastward and northward were formerly of great service in filling the numerous tanks, which rendered those districts the most fertile and populous of the land.

The ancient inhabitants appear to have been peculiarly skilful in the execution of works for the collection and distribution of water, the most remarkable of which are the spacious tanks excavated in the plains, and the dams constructed across the beds of rivers, or over ravines and vallies connecting small hills, and forming extensive lakes for flooding the plains in the driest season. I here allude to the ancient works which are to be met with in the district of Tangalle, and in the deserted provinces to the northward and eastward, now the resort of the wild tribe of Veddas, who live by deer-hunting. The lakes of Kandelay and Minery, each of which covers an area of several square miles, are situated in the plains extending from Trincomalee to "Anurajapoora," the ancient capital of the Island, and from thence across to Manaar and Aripo, in which district a reservoir of great extent, called "The Giant's Tank," was formed, and a stone dyke was constructed across the Aripo river to divert the current into it. These works are very ancient, that of Minery appearing, from authentic records which have been compiled, to have been constructed three centuries before the Christian Era. They were executed for the improvement of lands, which were probably distributed amongst the people employed in the work, and who dedicated a portion of their revenues to the temples and priesthood.

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The flatness of the districts bordering on the sea coast has occasioned the formation of extensive salt-water lakes or lagoons, which, from the channels connecting them, facilitate the intercourse of the maritime districts. Batticaloa, to the eastward, is much intersected by these lakes, which afford the means of internal communication These lakes extend along the eastern coast to the northward of Trincomalee, nearly separating the northern and southern parts of Jaffna. This district, and that of Manaar, lying contiguous to the coast of Coromandel, possess greater facilities of intercourse with the continent than the districts to the southward, the country vessels being able to cross over at all seasons, a circumstance that favoured the Malabars in their invasion and conquests of the country, and which facilitates the commerce still carried on with the continent.

In the districts of Colombo and Galle, this intercourse is much impeded during the south-west monsoon, from the boisterous navigation across the Gulf of Manaar, and the dangers of the coast To obviate this inconvenience, canals have been constructed for connecting the lakes and rivers, and which are calculated to secure a convenient channel at all times for the conveyance of produce. The coast-vessels can come over during the south west monsoon to Calpentyn, an accessible port in the Gulf of Manner, and their cargoes are conveyed from thence by canals to Colombo. These canals, which are not yet completed, were first projected by the Dutch, who designed to carry them to a port to be formed at Barbaryn, between Colombo and Galle; and in furtherance of this plan a canal had been opened into the Caltura River, 25 miles to the southward of Colombo; another has also been partially cut from the Mutwal River at Colombo towards the lake of Negombo to the northward, to secure the advantage of a more direct communication. On this work I have made a separate Report.

The means of internal navigation thus afforded to the inhabitants of this populous division will contribute largely to its improvement; and, with the advantages of climate and proximity to the coast of India, hold out a great inducement to settlers of all descriptions. The suburbs of Colombo extend to the banks of the Mutwal or Kalaniganga River, and the lake which insulates the town is connected with it by canals.

Throughout the southern division, where the rains are copious, canals are not less useful in draining the low lands than in the conveyance of produce. Embankments are also much required to secure the crops from destruction by the flooding of the rivers during the rainy season.

In the northern division the works in greatest request are tanks and water-courses, to secure the inhabitants against the frequent droughts to which those districts are subject.

The climate and seasons of the northern and southern districts are thus strikingly contrasted: on one side of the Island, and even on one side of a mountain, the rain may fall in torrents, while on the other the earth is parched, and the herbage withered. The inhabitants in one place may be securing themselves from inundations, while in another they are carefully distributing the little water of a former season, which is retained in their wells and tanks. The works of any magnitude in these districts having been destroyed, it is not uncommon for the villagers to raise their scanty crops in the beds of the great

tanks which formerly fertilized the surrounding plains. Much skill is displayed by the Kandyans in the cultivation of rice in terraces cut along the sides of hills, which are successively irrigated by the mountain streams descending to the valleys. This mode of cultivation is common in the south of India, Java and other Eastern countries, where works of magnitude are sometimes executed, and lands reclaimed by the co-operation of villagers.

Of the soil in the different divisions, that of the southern plains is sandy, and resting on a strong red marl or clay called "cabook," the base of which is granite. The cabook rises in small hills, and being secure from inundation, the natives place their habitations on them. Their villages are surrounded with plantations of coffee, palm and other fruit trees; the low grounds are usually laid out in rice.

The cabook affords a cheap material for the construction of roads and buildings, and in the southern districts is commonly used for both purposes.

The sandy soils of the south-west division are not considered fertile; and as the Cingalese but rarely improve their lands by tillage, they are much exhausted.

The cinnamon plant grows in sandy as well as in richer soils, where there is sufficient moisture; it therefore thrives luxuriantly within the influence of the south-west monsoon from Negombo to Tangalle, and in the interior districts having a western aspect.

From the humidity of the atmosphere, the cocoanut palm also thrives well along the sea coast of this division, and is thickly planted. These plantations contribute largely to the subsistence of the people, and are a great resource when the crops are destroyed from inundation. They also support several useful manufactures.

There are stronger soils in the elevated lands of Saffragam and Lower Ouvah, traversed by the Caltura, the Ginderah and Wallowe rivers; and the granite soil above the mountains are considered fertile, especially where forests have been cleared.

The productions of the hilly country of the interior, or those which are adapted to it, are various. Coffee grows luxuriantly, and with little care, although the produce is improved by culture. The province of Ouvah, which is drier and less wooded than the country about Kandy, yields tobacco of fine quality.

The provinces of Ouvah, Wellasse and Bintenne, to the eastward, are much depopulated, and difficult of access; but they are represented to contain some fine tracts of arable and pasture country. These, and the adjoining districts of Saffragam and Tangalle, appear to have been formerly populous and productive; and this observation applies also to the extensive plains situated northward of the hills, of which the soil is generally fertile. These districts, with the exception of Tangalle, have been nearly depopulated, and in several of them are the remains of numerous tanks.

The province of Nuwerakalawa, containing the ruins of the ancient capital, from the number and dimensions of the tanks, must at one time have been the most populous in the Island.

The soil of the northern division is sandy and calcareous, resting upon madrapore. The lands being level, and but little elevated above the sea, are irrigated from tanks and wells. They are manured and cultivated with care by the Malabar inhabitants. A natural reservoir

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is found near Jaffna, the water of which it has been attempted by Government to raise by steam. It is supplied from springs ; but at a certain depth, the water becomes brackish, and still deeper, it is salt. This reservoir, it was considered, would afford a constant supply of fresh water for the irrigation of the lands round it.

The chief productions of the Jaffna district are rice and tobacco, but cotton and various other plants are adapted to it. The dryness of the climate renders it a good sheep country, and the palmyra palm is as great a resource in the northern districts as the cocoanut palm is to the southward. Groves of these palms surround the villages, and are productive in seasons of drought when the crops fail. The fruit of the palmyra falls when ripe, and can be preserved. The leaves, like those of the cocoanut, are used for the construction of the native huts, as a substitute for paper, and for various other purposes. The toddy, or sap is similarly drawn as a beverage, and for distillation. The timber of the palmyra is much esteemed for rafters, and is exported in large quantities to the continent.

The coast from Chilaw to Manaar and Jaffna on the western side, and from Tangalle through the Mahagampattoo to the eastward, contain the most extensive and valuable salt formations which are met with on these coasts. They are accounted for by the peculiar dryness of the climate at certain seasons, and the rapid evaporation after rain. Salt is collected in the Jaffna and Manaar districts, at Chilaw and Putalam, and also at Trincomalee and Batticaloa. In some places it is formed spontaneously, and in others by solar evaporation in saltpans, or fields inclosed with embankments. The "Leways," or natural deposits, on the eastern coast, at Hambantotte, yield the largest supply of the finest salt. It is cheaply collected, and has obviously at former periods been a source of prosperity to the districts around, which are now depopulated. It is not certain whether these pits are connected with the sea, but the salt formed in the dry season crystallizes spontaneously, is of great purity and more slowly dissolved when exposed to the moisture of the atmosphere than that which is artificially prepared.

The sea fisheries are productive in all parts of the coast ; and in the neighbourhood of the salt formations, where a market for fresh fish cannot so readily be found as nearer to the towns, the quantity of fish that might be cheaply cured for consumption and for exportation would constitute a valuable resource to the people.

The common boat used in the fishing is a canoe, formed from a single tree, with an outrigger to support the sail. Large flat-bottomed boats are also used in shoal water. The Seer, and other large fish, are caught on the western coast, the Pomfret to the northward, and the Béche de Mer, or seaslug.

The pearl fishery, in the Gulf of Manaar, is rather an object of precarious and hazardous speculation than of regular industry, and in estimating the general resources of the Island is of inferior importance to the common fisheries. From the descriptions of ancient travellers, it carried on nearly in the same manner that was practised several centuries ago. As the trade was formerly open (the native princes receiving a tenth part of the pearls collected) there was more commercial activity than at present. The ancient towns of Mantotte and Putlam, and the districts around, probably derived much of their

prosperity from the pearl fisheries, which at all times attracted a great concourse of speculators from the continent, and of people in search of employment. At certain seasons the young oysters are seen floating in masses, and are carried by the current round the coast. They afterwards settle, and attach themselves by a fibre or beard to the coral rocks, and on sand they adhere together in clusters. When full grown they are again separated, and are locomotive. The pearls enlarge during six years, and the oyster is supposed to die after seven years. The natural history of the pearl oyster is imperfectly known, and the banks have been found suddenly to fail when a productive fishery had been anticipated. They are fished at a depth of six or seven fathoms, and in the calm season, when land and sea breezes enable the boats to go out and return daily.

Of the mineral productions, iron is abundant in some provinces, and also plumbago. The latter has recently been exported with some prospect of advantage; limestone has been found near Kandy.

The gems of Ceylon may be considered the least important of its mineral productions, and, as a Government monopoly, have ceased to be of any consequence.

The forests extend over several provinces of the eastern and western divisions, and contain much useful and valuable timber. Of those which can be exported with advantage, the ebony, calamander and satin woods are the most esteemed, and the sapan wood for dyeing. As the latter wood can be cut into logs of any size, it is easily transported from the forests of the interior.

The jack-tree is more serviceable to the inhabitants than any other, excepting the palms. The fruit of it is nutritious, the leaves afford fodder for cattle, and the timber is generally used for household purposes, the furniture made from it having some resemblance to mahogany. Plantations of the jack-tree have been made, but they are inadequate to meet the demand.

The replies of the several collectors and agents of Government, which contain a particular account of the seasons, productions and peculiarities of their respective provinces, will afford further information on these subjects.

Respecting the climate of Ceylon, I can refer with confidence to the intelligent observations of Dr. James Forbes, the inspector of hospitals, and to the journals he has furnished of the atmospheric changes in the interior and maritime districts for a series of years. The general conclusion to be drawn from these details is, that where the country is depopulated and overgrown with jungle, or exposed to the influence of malaria from uncultivated marshes, endemic fever returns at certain seasons, though irregularly; and that at other periods, the country is healthy.

The maritime districts, and especially those which are the most populous, are more free from miasmata than those of the interior, and hence the climate of Ceylon may be expected to become more uniformly salubrious when the country is more generally cleared and cultivated. By draining the marshy grounds, and clearing the jungles in the environs of Trincomalee, the climate of that place has been improved; on the other hand, the most productive province of the interior (Seven Korales) has become unhealthy from the numerous tanks which have recently fallen to ruin, and the consequent growth

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of jungle and the generation of marsh miasmata. The jungles which produce fever consist of rank shrubs of rapid and luxuriant growth, which spring up in marshy grounds, or over uncultivated tracts.

The lands situated in the neighbourhood of Colombo are low, and subject to inundation from the Mutwal River; but as they are regularly cultivated, the atmosphere preserves its purity. An uncultivated marsh, situated to the north-ward of the town, and which it has been proposed to drain and cultivate, renders the northerly winds which blow over it less wholesome.

At Colombo the mean daily variation of the temperature does not exceed 3°, while the annual range of the thermometer is from 76° to to 86½° of Fahrenheit. At Galle the mean daily variation is 4°, and the annual range from 70° to 87°. At Jaffnapatam the mean daily variation is 5°, and the annual range from 70° to 90°. At Trincomalee the greatest daily variation is 17°, and the annual range from 74½° to 91½°. At Kandy the mean daily variation is 6°, and the annual range from 66° to 80°; and higher up the hills, at Nuwara Eliya, a military convalescent station, the mean daily variation is as high as 11°, while the annual average of the thermometer is from 35½° to 80½°.

11	inches in	April.
21	——	May.
29	——	Oct.
20	——	Nov.
81		

In Colombo the quantity of rain that fell during the year 1830 was 102 inches, of which 81 inches fell in the months of April, May, October and November.

The principal roads in the maritime provinces extend along the sea-coast, and carriage-roads have been made from Colombo as far as Chilaw to the northward, and through Galle as far as Matura to the southward. Carriage-raods have also been made from Colombo to Kandy, one by the way of Kurunegalle, which is in a direction towards Trincomalee through the flat country; the other over a nearer pass of the hills. Several other roads and communications through the districts have been opened, and some are now in progress. The main road to Kandy is a work of great magnitude, having been carried through some difficult passes of the hills, and connected by several bridges, the largest of which, over the Mahavillaganga, near Kandy, is still unfinished. An iron bridge is intended to be thrown over the same river on the Kurunegalle road.

The natural resources of the Island, and the advantages which it derives from its position over the neighbouring continent, appear to have been more highly appreciated in ancient times than they are at present. From the wars carried on by the natives, and the devastations committed by the Malabars who invaded the country, its agricultural prosperity had declined before the Portuguese had made their first settlement on the coast. The ancient capital of Anarajapoora was abandoned in the 13th century, but the external commerce of the Island was not materially checked till the Portuguese established a monopoly of its productions, and interrupted those maritime relations which had subsisted before the discovery of the passage round the Cape of Good Hope. Previous to that event, the central situation of Ceylon led to its ports being frequented by ships from China, India and Arabia, then the entrepôts of general commerce, and to which countries the productions of the Island were carried. The ports of

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Colombo and Galle were favourably situated for this trade, and may again be much frequented. Trincomalee is chiefly important as a naval station, although the country was once populous, and exported grain and provisions to the Coromandel coast.

The magnitude of the ancient works for the irrigation of the country sufficiently attest that it must formerly have been much more populous than it is at present. Some districts are entirely depopulated; and with the exception of Colombo, Galle, and Jaffna, they have all declined.

The latest returns that have been made up were called for in 1824, and from these it appears that in the southern or Cingalese provinces, the number of males and females was 399,408; in the interior or Kandyan provinces, 256,835; and in the northern or Malabar districts, 195,697; making the total population of Ceylon 851,940. Compared with the returns from the maritime provinces in 1814, they exhibit an aggregate increase of 119,222 in 10 years, a rate at which the population would be doubled in 35 or 40 years.

Total Population of the Maritime Provinces in

1814	...	475,883
1824	...	595,105
Increase		119,222

These returns contain the number of males and females in every village, and the number of each class or caste; and as registers are kept of marriages and births in the maritime provinces, they may be considered generally correct. The returns from the Kandyan provinces are less detailed, and are derived from less authentic sources.

Population in Ceylon may be considered to increase faster than capital has accumulated; but as the inhabitants, with the exception of those resident in the principal towns, are in the possession or occupation of land, they have in general the means of subsistence.

Of the inhabitants of the Island, the Malabars, who occupy the northern districts, are Hindus, and have retained the religious distinctions of caste, and the language and customs of the tribes of southern India, under some modifications which have been obviously derived from their intercourse with the Cingalese. The language and customs of the Cingalese, who occupy the interior and southern divisions, are in some respects peculiar; and as they have undergone but little change in the Kandyan provinces from a very remote period, the origin of the system which has been established by the European Governments may be distinctly traced from them. The civil institutions of the Cingalese, who profess the religion of Bhood are obviously derived from Hindu origin. The possession of their lands on tenures of service, and the division of the people into classes, according to their various trades or occupations, subsist also among the Malabars, and probably prevailed throughout the continent of India before the Mahomedan conquests; but the abolition of the religious distinctions of caste has constituted a marked peculiarity in the institutions of the Bhoodists, which drew on them the hostility of the Brahmins, and produced the religious wars which depopulated the country and led to the settlement of the Malabars in the northern districts of the Island. The civil distinctions of caste have doubtless originated in an attempt to introduce a division of labour, and these distinctions have been rendered hereditary from the privileges acquired by particular

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castes, and by the practice of assigning lands for the conditional performance of labour or service.

Although the ostensible employments of particular castes have been frequently changed, and different occupations are constantly engaged in by people of the same caste, the intermarriage of the high and low castes is prohibited by the Kandyan law, and many absurd distinctions are recognised and enforced, by which the latter are degraded and reduced to a servile condition, which becomes hereditary.

The highest and most esteemed caste is that of Velales or Goyas, whose occupations are purely agricultural, but as land is assigned for the performance of every description of service, the practice of agriculture is not confined to this class, but is exercised by persons of all castes for their subsistence.

The lands are generally cultivated by small hereditary proprietors or tenants, and usually under a conditional tenure, obliging them to make contributions or to perform some public or private service, although in some instances the lands are held under free grants.

Rice being the ordinary food of the people, the arable lands are divided into rice-fields, or grounds enclosed by embankments to retain water. In the low country, where they can be irrigated by rivers or tanks, extensive tracts are thus laid out. In the hills the rice fields are cut in terraces, which are watered by the mountain springs or streams laid out. These fields are separated by tracts of high ground attached to them, which are cultivated once in eight or ten years by cutting down and burning the jungle. These are distinguished as "çhena" or commons, and "owitte" or wooded lands. The produce being irregular and precarious, they are not usually considered service lands, but are liable to assessment when cultivated in grain. The rice-fields which can be annually cultivated are registered in "panguas" or shares:—in the registers (lekam metyas) is inserted the nature of the service to which the owner or occupier is liable A "Gama" or village is a term applied to the lands of a division on which the cultivators usually reside in small communities or hamlets, and sometimes to a single estate or field with its occupiers, and may therefore include one or many shares.

"Royal villages" are Crown lands which, under the native Government were generally cultivated by tenants at will, who delivered the whole produce for the use of the King's household, and who held other lands which they cultivated for their own subsistence; but in some cases the cultivators had "parveny" or hereditary titles to their fields (*d*). If they did not hold other lands, they retained half the produce for their subsistence, or retained the whole, performing some personal service in return for it. as domestics or retainers. The royal lands were often granted or assigned to a chief (nindigamma), who engaged to perform certain services to the State for them, and made similar engagements with the tenants. These grants were either hereditary or for life; and the retainers (nillikarias), if in possession before the assignment was made to the chief, acquired permanent titles.

(*d*) Many of these titles are of ancient date, and engraved upon copper.

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Hereditary or parveny titles could also be acquired either by grant or by undisturbed possession for 30 years (*e*), and also by clearing and cultivating waste lands.

When free grants of service-lands were conferred, the proprietors and their descendants were exempt from obligations of service. The hereditary proprietor of service-lands might voluntarily surrender the lands, or otherwise dispose of them, if he disliked the service, but he could not be dispossessed. In some cases he might find a substitute, and where females inherited the lands, they were always allowed that privilege. Besides the lands which are held on tenure of service to the Government or to chiefs, there are others which have been dedicated by the native Government or by individuals for the support of colleges of Bhoodist priests (wihares), and of heathen temples (dewales). From the policy of the Kandyan Government these various tenures have been distributed throughout the different provinces in a manner to divide the possession in almost every village, and thus to prevent the union of any large body of retainers under one superior. Lands cleared and cultivated were dedicated by the people to the king, or to the chief or temple under whom they held, from whom them claimed protection, and to whom they made contribution or rendered service.

The classification of the people, and the distribution of lands, being the basis of the Kandyan system of Government, the civil and judicial administration of the country before the conquest was intrusted to chiefs, who superintended the employment of the people assigned to particular duties, and who for their services were freed from contribution for their own lands. These chiefs were placed over particular departments of the State, or in the Government of the provinces, which were subdivided into "korles," and "pattoos," to which inferior chiefs were appointed.

The heads of villages (vidahns), to whom the people immediately referred, were sometimes appointed; but in some cases their offices were hereditary, and lands were ordinarily assigned for their support or use, and for that of other village functionaries. The headman of each village directed the labour of the people, under authority of the chief of his province, or of the particular department to which their services were assigned, in which case the provincial authorities exercised no control over him; he was also intrusted with the police of his division, and a village council (gansabe) (*f*) was assembled by him when required for the investigation of cases which were referable to its jurisdiction

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(*e*) By a Proclamation of the Governor, dated 18th September, 1819, it was provided that a possession of land for 10 years should be a sufficient bar to any suit brought for recovery of the same.

(*f*) I attended one of these assemblies near Kandy, and was gratified in observing the regularities of its proceedings. The landholders of the village were assembled, and the witnesses duly examined. The case in question, relating to the boundary of lands, had been decided by the Judicial Commissioner's Court, and having come before the Governor in appeal, was referred back for further evidence, and for the verdict of a jury of the village in which the lands were situated.

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The superintendence of agriculture was the duty of a particular class of persons (majoraals), who attended to the embankments, to the repair of tanks, and the distribution of water, an office of much importance in a country so dependent upon artificial irrigation.

As the changes effected in this ancient system have materially differed in the maritime and the Kandyan provinces, it will be necessary to consider them apart.

The sovereigns of the country having been found in possession of a monopoly of cinnamon, and other valuable productions, the Portuguese first obtained these objects by treaty, but having acquired the sovereignty in 1597, at the demise of a King of Kandy who had become a Catholic, an arrangement more favourable to the people was made. Their laws and customs were confirmed to them in an assembly of the chiefs at Colombo, and they were allowed freely to trade in cinnamon on delivering a fifth part of their collections to the Government.

These conditions were subsequently revoked by Philip the Second in 1626, and in the continual wars in which the Portuguese were subsequently engaged with the people, they lost the sovereignty they had acquired, but they devastated and impoverished the country.

The Dutch, who dispossessed the Portuguese of their settlements in 1656, assisted by the Kandyans, introduced a system still more rigorous. A monopoly of the trade being a primary object with them, their arrangements were chiefly made with a view to it. All private trade was prohibited in the most valuable productions of the Island, and in those of other countries which the people had been accustomed to import. To obtain the labour of the people in the various works they carried on, they confirmed their land tenures, and emyloyed them gratuitously in erecting magazines and fortresses, and in collecting cinnamon and other productions of the country.

Of the people who abandoned their lands to escape from these laborious services, some retired to the interior and others sought private employment in the towns The latter were compelled, under severe penalties, to re-occupy their lands, and to work for the Government during three months in the year. To prevent all evasion, they were not allowed to mortgage or sell their lands without leave, and the customs and distinctions of caste were rigorously enforced by penal regulations.

The natives of the Continent, when allowed to settle in the Island, paid a capitation tax (oliam), or were liable to work gratutiously for the Government.

The civil and judicial administration was intrusted to native officers, who acted under the Modeliars of korales or counties, and were subordinate to a European functionary in each province. These officers composed a native Court called the "Landraad."

The "Wannias," or Malabar chiefs, exercised similar powers. The revenues were collected through native receivers, who were generally the majoraals and heads of villages who superintended the cultivation of the lands. The public functionaries, who received small salaries, were remunerated by the assignment of lands called "accommodessans," which they held free from taxes and services. To obtain these advantages, and to acquire inufluence, the offices under Government were eagerly sought by the natives, and the number of

them was greatly increased by honorary and titular appointments.

Previous to the capture by the British forces in 1796, the Dutch, with a view to secure the exclusive monopoly of the inland trade, had acquired possession of the entire sea-coast. They were thus enabled to control he supply to the interior of salt and some other necessaries of life.

The administration of the affairs of Ceylon under the Government of Madras was intrusted to a major general commanding the forces, assisted by three civil officers, who were stationed at Colombo, Galle, and Jaffnapatam.

On the transfer of the settlement to the Crown 1798 ,a Governor was appointed, with authority to nominate a council of advice, and several gentlemen were sent from England to fill the principal offices, and to form a civil establishment for the Island in some respects resembling the civil service of India.

The further colonization of Europeans in Ceylon was prohibited, and the trade in cinnamon was reserved as a monopoly in the hands of the Crown. The principal changes effected in the Dutch system consisted in the liberation of some branches of trade by the substitution of custom duties on the articles of commerce, the abolition of inland customs or transit duties, the substitution of salaries to public servants for the mode of remuneration by the assignment of lands, and the assessment of land rents in commutation of all unpaid services exacted in virtue of the land tenures.

The exigencies of the public service during the Kandyan war that ensued having led to the renewal of the claim on the services of the people, this claim has not been subsequently relinquished, and all persons of certain castes, without reference to the possession of lands, are required to serve according to their caste and to what is declared to be "custom," payment being made to them for their labour at certain rates which are fixed by the Government. The inhabitants of the town of Colombo and suburbs, (its gravets), intitled "burghers," have been exempted from this general obligation. In 1809, the making of roads was declared to be a gratuitous service falling on the inhabitants of the districts through which they passed.

On the appointment of the Supreme Court of Judicature in 1801 the civil and judicial administration was separately provided for. The "Landraad" Courts were abolished, and the territory being divided into eight districts, a collector and a provincial judge were appointed to each from the civil service. The collectors were entrusted with the power of magistrates, and were charged with the collection or framing of the revenue, the superintendence of public works, and the authority to call out the inhabitants for labour or service when required. They were enjoined to make annual circuits through their districts, and to transmit journals and reports to the Government ; but this practice has been discontinued since 1824. The reports of the collectors which were made anterior to that period contain many valuable observations respecting the state of the country. A separate department was created for the collection of cinnamon, and the superintendence of the plantations which had been formed by the Dutch. The "Chalias" or cinnamon peelers, a caste of people who, with others, were appointed to this labour, were placed under the department, and the superintendent, who held registers of these people in the different

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districts, called them out when required, and exercised separate authority as magistrate over them.

In 1810 the prohibition against the acquirement of land in Ceylon by Europeans was withdrawn, and in 1812 Europeans were allowed to receive grants of land, not exceeding 4,000 acres, and free from tax for five years.

The Kandyan provinces, which had been first acquired by the British Government in 1815, were settled on their present footing after the rebellion in 1818, and have been separately administered by the Governor, without the assistance of his Council. These provinces were placed under the immediate superintendance of a Board of Commissioners, which Board is now composed of the commandant of the troops in Kandy and two civil servants, having charge respectively of the judicial and revenual departments. The Kandyan territory is divided into eleven provinces or districts, of which five, situated above the hills around Kandy, are placed under the immediate superintendence of the Board of Commissioners, to whom the Government Agents resident in those districts directly refer. The districts situated more remotely from Kandy, and below the hills, are also placed under Government Agents, but who are intrusted with the same authority which is exercised by the collectors in the maritime provinces. In one district (Seven Korles), a separate agent for part of the judicial affairs has been appointed, but the Government Agents in that and all the other districts are charged with the civil and judicial duties and with those of police. With the exception of the Government Agencies in the three provinces of Saffragam, Seven Korles and Tamankadawe, which are held by civil servants, these offices have been filled by officers of the regiments stationed in the Island.

1. Udaratte.
2. Four Korales.
3. Matale and east part of Nuwerakalawa.
4. Harasipattoo and Tumpane.
5. Hewahette and Walapane.

The separate administration of the Kandyan provinces is maintained under the convention which was concluded in the name of His Majesty with the Kandyan chiefs in 1815, and modified in some of its provisions by a proclamation of the Governor, issued after the rebellion in 1818, by which the authority of the chiefs was curtailed. By the 4th clause of the convention of 1815, the dominion of the Kandyan provinces was vested in His Majesty, subject to the condition of maintaining the laws, institutions and customs of the country; and by the 5th clause, the religion of Bhood was declared inviolable, and its rights, members, and places of worship, were to be maintained and protected.

See Convention, dated 2nd March, 1815.

See Proclamation, datad 21st November, 1818.

In pursuance of these arrangements, which were generally approved by His Majesty, the Government of Ceylon has enforced its claim to the services of the inhabitants, as originating in ancient custom or the tenure of lands, while it has been regarded by the chiefs and priests as reciprocally bound to support the authority of the privileged classes, and to compel an observance of the religious customs, even where the people have manifested reluctance or negligence in their performance.

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On the settlement of the country in 1818, a considerable change was made in the Kandyan tenures of land. A rent of one-tenth of the produce, to be levied in kind, was imposed on the land, and the claim of the Government to the gratuitous services of the people, in virtue of their particular tenures, was relinquished, the Government reserving to itself the power of employing all persons according to the customs of the country, or the tenures of their lands, on paying them for their labour at an established rate. To this rule there were certain exceptions. The hereditary lands of certain chiefs were exempted from contribution in reward of their fidelity and services. The lands of all chiefs and headmen employed in the public service were also exempted, as a remuneration for their services, the exemption in this case being allowed only during the period of their employment (g.)

Persons employed as public messengers in the conveyance of mails, or in personal attandence on the chiefs, were also required to serve gratuitously on being exempted from the tax on their lands. The people of certain low castes, who were appointed to collect cinnamon for the Government, were also exempted from the tax. They consisted of certain classes of people who had been employed about the Kandyan Court, and in services which were not required under the British Government.

As it was considered desirable to provide for opening communications through the country, the duty of clearing and making roads, and of putting up and repairing bridges, was declared (as in the maritime provinces) a gratuitous service, falling on the inhabitants of each district through which the roads and bridges were required. Certain districts, the inhabitants * of which adhered to the Government during the rebellion, were assessed only at the rate of one-fourteenth of the produce of their lands, and the estates forfeited during the rebellion when restored were subject to an assessment of one-fifth of the produce.

* *See* Proclamation, 21st November, 1818, clause 19.

The crown lands (royal villages), where they have not been granted away to individuals, are cultivated by tenants who contribute half the produce. It was customary also, in some cases, to assign other lands to these tenants for their support, in which case they delivered the whole produce. Lands assigned for the support of temples and colleges of priests were exempt from the grain-tax, but the holders of these lands were bound to render certain services to Government when called on, and they have been employed on the roads in common with the holders of Government lands.

In consequence of the prevailing disposition in the native Kandyans to dedicate their lands to the temples, by which they generally released themselves from services and contributions to the Government, a proclamation was issued by the Governor, in the year 1819, to provide for the registry of temple lands, and to

Proclamation, 18th September, 1819.

(g) Under the Kandyan Government, the inferior offices were annually resumed and re-granted on payment of a fine, which constituted one branch of the public revenue.

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prevent such assignments without the sanction of Government.

The possessions of the temples constitute a large proportion of the cultivated lands in the Kandyan provinces. In the several temples and colleges there are registers of the lands dependent on them, but these registers not having been examined, their extent has not been accurately ascertained. At my request, translations were made of the registers in the principal temples of Kandy; and from these it appears that the tenants and proprietors of what are called "Temple Lands" in the several provinces, are liable, on the requisition of the chiefs and priests, to render services and contributions of various kinds. These are minutely detailed in the registers, and the occupier of each allotment of land has a special duty assigned to him, or a special contribution to make, either for the repairs of the temples, the subsistence of the chiefs and priests, and their attendants, or on occasion of the annual festivals. The regulation of these festivals, which are annually held at Kandy, and at the provincial temples, was the prerogative of the King of Kandy, and the holders of temple lands are still summoned by authority of the Government. To those who reside at a considerable distance, the necessity of making long journies to deliver some trifling article of little value, or to assist at some protracted ceremony, became irksome and inconvenient; and as they are liable to detention for a month at Kandy during the annual festival, these duties are very negligently performed, and numbers omit them altogether. In 1820 the Government Agent for Saffragama (a distant province to the southward), stated the willingness of the land-holders to pay a tax in commutation of the temple service; but in deference to the chiefs and priests, who were opposed to innovation, the measure was not adopted. Some landholders, from their influence, have been allowed to pay a composition to the temples, instead of rendering personal services for their lands. The laxity of the people, and the remissness of the Government officers in enforcing the orders for their attendance, has been urged as a subject of complaint by the chiefs.

Where the lands are situated near to the temples, and in districts where roads are constructing, the service is less unpopular, as it is in reality less severe than the Government service; but any improvement in the condition of the tenants of the Crown would strengthen the desire of the tenants of the chiefs and temples throughout the country for a similar reform of their tenures. If temple land should hereafter come into possession of persons who are not Bhoodists, new objections would probably be raised to the performance of the temple service by such persons.

No account being preserved or rendered of the contributions now made, and the chiefs having earnestly requested that the attention of His Majesty's Government may be drawn to the prevailing desire among the natives to study the English language it might tend to reconcile them to a change of system, if, in regulating the contributions for the temple lands, and in reforming the service tenures, the concurrence of the chiefs and priests could be obtained to the appropriation of a part of the revenues to the maintenance of an English seminary.

Although unconnected with the subject of the lands, it may be mentioned in this place, that the possession and exhibition of the relic of Bhood is regarded by the natives of the Kandyan provinces as the

most important of the prerogatives of the King of Kandy to which the British Government has succeeded. This relic is deposited in a golden casket in the principal temple at Kandy under the charge of the Board of Commissioners; and when it is exposed to view the people of all classes are expected to repair from the remotest provinces to the capital. The exhibition of this relic in 1828, in the presence of the Governor and other British authorities, gave occasion to the assemblage of a large concourse of people from the provinces, and to the contribution by them of a considerable sum, which has been placed in the custody of the Board to be appropriated to the embellishment of the temple.

Rixdollars 10,000, or 750*l.* sterling.

This ceremony, which was conducted with great pomp, had been but rarely renewed by the Kandyan Kings, from the manifest inconvenience of drawing so large a concourse of people from their districts.

The selection and appointment of chiefs and priests of temples was a prerogative of the Kings of Kandy, which is still exercised by the Government, although in the nomination to the priesthood the recommendation from the wihares (colleges) are usually attended to. This interference of the Government in the religious affairs of the country, although induced from consideration of policy, has been attended with much inconvenience. It has failed to satisfy the chiefs, and it has checked the improvement of the country, and the advancement of the people. While the Government was bound, by the convention of 1815, to protect the people in the free exercise of their religion, the interposition of its authority to enforce an observance of its rites is at variance with those principles of religious freedom which it is a paramount duty to uphold. Nor can it justly afford to the Bhoodhist faith a greater degree of support than it extends to the Christian religion, and to other systems, including the Hindu and Mahomedan. In some districts, particularly those of Colombo and Galle, the Christians are more numerous than the Bhoodhist, and the exertions made by the Christian missionaries for the diffusion of knowledge, and for the correction of the habits and morals of the people throughout the country, have pre-eminently tended to promote the best interests of the country.

The form observed in the promulgation of laws in Ceylon, has been by regulations of the Governor in Council when applicable to the maritime provinces, and by proclamation of the Governor when applied to the Kandyan provinces.

The acts or orders of the Executive Government are promulgated in the form of "Government Advertisements," or of Government Minutes," which have been recorded in Council, and also by circular letters from the Chief Secretary, addressed by the authority of the Governor to the heads of departments, collectors, sitting magistrates, or other civil authorities in the districts, but these letters have not always been published for general information.

As the English language is not generally understood, the regulations of Government, the proclamations and Government advertisements, are published with translations into the native languages (Cingalese and Malabar.)

The members of the Council are appointed by the Governor, and

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their duty is to advise and consult with the Governor only when convoked by him. New laws, or changes in the law, intended to be applicable to the maritime provinces, are proposed by him in the form of minutes, and the laws are passed either in conformity to these, or modified upon the suggestions of the members, when approved by the Governor. If the Governor should pass a law without the concurrence of the Board, the members who dissent from it may record their opinions

On reference to the proceedings of the Council, it does not appear that any record is kept of the consultations, except in particular cases, which have been chiefly those wherein questions have arisen on which the Governor and Chief Justice, as first member of Council, have been at issue. Nor does it appear that any instances have occurred in which the opinions of a majority of the members have been opposed to that of the Governor.

On the publication of the regulations of Government in the maritime districts, and of the Governor's proclamations in Kandy, they take immediate effect, subject to the approbation of His Majesty, although this condition is not expressly promulgated.

If the Governor should decide that any regulation passed for the maritime provinces should be extended to the Kandyan provinces, it is published there, with the addition of a declaratory order to that effect. On these occasions it has been customary for the Governor previously to refer the regulation to the Board of Commissioners at Kandy for their opinion of its applicability; and where objections have been stated by them, the regulation has in some instances not been extended to the Kandyan provinces. In the executive administration of the Government, the references to the Council have not been frequent. The proceedings of the Governor, in his executive capacity, are usually recorded in the Secretary's office, or in that of the particular department charged with the execution of the measure.

A record is kept of the proceedings of the Board of Commissioners at Kandy; but all measures proposed by them are submitted for the approval of the Governor before they are carried into effect.

The Governor being restricted from authorizing contingent disbursements exceeding 75*l.* without the concurrence of the Council, it has usually been recorded when their sanction to such disbursements has been given, the estimates of the proposed work being laid before the Board. In the Kandyan provinces, the Governor authorizes such expenditure on his own responsibility. The principal civil departments at Colombo, and the collectors of the maritime districts, act under the general instructions which were framed for their guidance in 1808, and which have been subsequently modified. The revenue commissioners and the Government Agents in the Kandyan provinces act under special instructions which have been compiled for them.

The public works of a general nature which have been carried on under the authority of Government have been the construction of roads and bridges, the opening of canals, the erection and repair of Government houses, barracks and public offices. In those cases, where a specific disbursement has been made on a particular work exceeding the sum of 200*l.*, the authority of the Secretaay of State to incur the expense has been previously applied for and obtained. The works of a local nature have consisted of the erection and repairs of public

buildings at the seats of magistracy, of grain and salt stores in the districts, and of rest-houses along the principal roads; also the construction and repairs of district roads, tanks and watercourses, the draining of lands and securing them from inundation by embankments, and the forming of cinnamon, coffee and other plantations.

The works of a general nature have been undertaken by the direction of the Governor, either on the written or verbal report of a professional officer, or upon his own judgment without such report; but in the maritime provinces, the estimates have been subject to approval in Council in cases where the expenditure on any particular work has exceeded 75*l.* Works of a local nature have usually been recommended by the collector of the district, and undertaken on his own estimate, if approved by the Governor. In instances where some considerable work has been proposed, the report of a professional officer has been required; but, with the exception of the great roads, the collector has usually superintended them, and reported on them when undertaken by contract.

As public works have generally been executed by means of the labour of the inhabitants, who have been required to work either at the rate of wages fixed by Government, or gratuitously, according to circumstances, the authority of the Governor has of late years been usually obtained for calling out the number required for the work, and the duty of pressing them has devolved upon the native headmen, by whom the details have been regulated. In some districts the headmen have kept diaries of the number of labourers thus employed, but not always so; and where returns have been compiled from these records, it does not appear that any fixed rule has been observed either in regard to the duration of the service, to the description of labour on which the people have been employed gratuitously or for pay, or to the rate of their remuneration when paid at all.

As in the maritime provinces, the people are required to serve according to what is generally termed "custom" or "usage" without reference to their landed tenures; no registers have been formed by which the headmen are bound to be guided in calling them out. In works of a general nature which are not superintended by the collectors of districts, estimates have not usually been framed, but the authority of the Governor has been given for calling out the number of people from the districts which are required to furnish labourers.

When public works are undertaken partly in the maritime and partly in the Kandyan provinces, they are conducted under the regulations which are respectively in force in them, the number of labourers required in each instance being divided into reliefs, according to the distance they are required to travel from their homes.

The most laborious and extensive services which the people have been called upon to perform have been those of felling and dragging timber from the forests to the banks of rivers, constructing roads and bridges, collecting salt, catching, attending and collecting forage for elephants for public use, and conveying public stores; also the collection of cinnamon in the forests by the castes on whom this duty has devolved.

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Government Minute, 16th November, 1825.

When public labour is not gratuitously performed, the wages are paid by the collector of the district according to certain rates fixed by the Government. Where works have been superintended by officers of the corps of Royal Engineers, they have kept diaries of the number of pioneers on the fixed establishment who have been employed under them, but not of the number of the natives called out to assist, of whom there appears to be no regular account. All that is known on the subject is the number whom the collectors or agents of Government have been authorized to call out by reliefs: the number of reliefs, and the time of their employment, being dependent upon the duration or extent of the work to be performed.

Besides the demand on the services of the people for public works or labour executed under the authority of the Government, there are various other purposes for which they are liable to be called out by the collector. Fishermen are required to furnish boats for service and attendance at the pearl fisheries, and on other occasions. When individuals travel on the public service they are furnished with "coolies," or porters, for carrying their baggage and palanquins, at rates fixed by Government; and provisions are ordered to be supplied to them at rates also fixed at the stations where there are no markets. When persons of distinction are travelling, the people of the Washer caste are required to cover the rest-houses with white cloth, which the latter furnish. Temporary buildings are sometimes erected for their accommodation; and the inhabitants are required to decorate the roads with palm-leaves, and to carry torches at night from village to village along the road. In some cases, these services are remunerated; in others, the people are required to render them gratuitously.

When particular provinces are infested by herds of wild elephants, the inhabitants are called out to aid in destroying them; and since the Government has formed an establishment of draft and carriage elephants, it has been a particular service to catch and train them for the public service, or for sale. Individuals who catch them on their own account sell them to the Government at an established price, and cannot retain possession of them without special license.

The extent to which the labour or services of the people have been required by the Government in the different provinces, it would be impossible to estimate. The returns furnished to us by the collectors of the maritime ditsricts, and by the Government Agents in the Kandyan provinces, are too imperfect to be depended upon; but as those which have been framed by the Collector of the Colombo district from the diaries of the native headmen, during 11 years from 1820 to 1830, are the most complete, the result will admit of being stated, although not quite accurate. From these returns it appears that the people have been called out for periods varying with the extent and duration of the work; that the average number of day-labourers thus employed annually on public works in the district of Colombo, or in collecting materials, has been 93,535, or 296 daily for working days, of whom 26,190 have served gratuitously, and 67,345 have been paid, at rates varying from 4½*d.* to 6*d.* per day; that 50,000, who were paid at these rates in the year 1830, were employed in the care of elephants and stock, and providing forage for them; that from 20,000 to 30,000 day-labourers have been employed

in some years for the conveyance of salt and Government stores, but the number could not be accurately ascertained, as the moormen, till the last year, were bound by caste to cary salt for Government as a gratuitous service, and no account was kept of their number. The foregoing numbers are taken from the returns, and represent the number of labourers called out, multiplied into the number of days that they were employed.

The persons who are exempted from the general obligations of labour or attendance are the burghers, or descendants of Europeans, and the higher class of natives. In some instances, where they were owners of land, these persons have been called upon to find substitutes to aid in the embankments required to protect the rice fields from inundation; but some works undertaken for the benefit of the towns have been executed by the people of the country without such assistance. A road round the lake of Kandy, and a bankshall at Colombo, are of this description. Labourers on public works have sometimes obtained substitutes, and paid them *5d.*, per day when receiving *2½d.* from the Government.

In the Kandyan provinces, where public labour is still performed by the people as a service for their lands, there is less irregularity in the mode of distributing it, as the owners or occupiers of certain panguas, or shares, are required to serve in rotation; but in all cases the authority possessed by the native headmen over them is open to abuse, in the opportunities they have of appropriating the labour of the people to their own purposes, or of excusing them from public work out of favour, or for a pecuniary consideration. Such abuses are acknowledged to exist, and are proved by reference to some of the returns, although they are generally difficult of detection, from the inducement of the people to acquiesce in such irregularities of their headmen, especially where the public labour is gratuitously performed, and more severe than that which they perform for the headmen. It is acknowledged also to be an ancient custom of the country for the people to assist each other gratuitously in the tillage of their lands, and that the headmen usually obtain assistance in this manner without payment.

In some districts through which the main road to Kandy has been carried, the people called out have been constantly employed for several years, and no correct account of the number can be procured. They have been usually relieved at certain periods of the year, and for short intervals, to enable them to cultivate their lands. The authority to return to their homes has, on application, been granted by the Governor, and in certain districts has not extended beyond a few weeks in the year, which is all the time allowed to them for those labours in which the subsistence of themselves and their families throughout the year may depend.

As the people are obliged to provide their own subsistence, it is admitted that they occasionally earn their daily food by private labour, when they can elude the Government overseers. It has been also observed that labour has been assigned to men which could have been performed with less sacrifice by animals, such for instance as the dragging of timber from the forests, a labour which has been advantageously performed by elephants.

The people thus detained from their agricultural pursuits, and

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worked without remuneration, are much less efficient than the Government pioneers (a body of men who are subsisted and regularly paid), or than hired labourers generally would be, and their reluctance to perform the labour has exposed them to punishment by the overseers of works. In the maritime provinces these overseers are expressly authorized by a Government advertisement, dated in 1802, to inflict corporal punishment on the labourers, and under this regulation the superintendent of the cinnamon plantations has considered himself authorized to inflict it on the "Chalias" or cinnamon peelers, for neglect of work.

Government advertisement, dated Trincomalee 28th April, 1802.

The authority exercised by the Governor in the granting of lands has been regulated, in respect to Europeans, by the Government Advertisement of 1812, which limited the extent of such grants to 4,000 acres; but as few applications have been made, such grants have been of rare occurrence, and in these instances difficulties have occurred. In the present state of agriculture in Ceylon, the high lands called "Chenas," although waste lands, are usually retained for pasturage of cattle, and except in the uninhabited parts of the Colony, these lands, though uncultivated, are private property, which the landholders are unwilling to dispose of.

From the declining state of some districts, and the neglect of ancient works, lands which were formerly cultivated have been deserted, and are overgrown with jungle. To these lands the native assert their hereditary claims, and as the support of those works on which their fertility depend was considered the duty of the ancient Government, the assistance of the present is claimed to restore them.

The property of the crown being much intermingled with that of individuals, the influence of Government has been exerted in some instances, where grants of the former have been made, to induce the contiguous proprietors to surrender their claims on pecuniary compensation being made, or in consideration of their lands to be conceded to them. The attachment of the natives to their hereditary possessions, and their jealousy of the interference of Government, have induced them generally to yield with the geratest reluctance to such proposals, and in some instances to reject them.

The grants of land made to natives have been more limited in extent than those made to Europeans, varying in different districts from 10 to 100 acres. By a proclamation of the 3rd May 1800, not more than 36 acres were grantable to one person, a limitation which has checked the application of capital to land, and the improvement of agriculture.

There is a regulation in force for restricting the felling of timber without license of the Government even on private grounds, and for imposing a tax of one-tenth on the value of the timber cut. These regulations are also great obstacles to the improvement of uncleared tracts of jungle or forest. Lands are usually granted to natives subject, to the payment of tithe, and to such regulations as the Government may establish, the lands being resumable in three years if not duly cultivated.

See Regulation of Government No. 2 of 1822.

It does not appear that persons are disqualified by caste from acquiring lands, or that natives of the continent of India are excluded,

although their liability to be called on for performance of public labour in common with the natives of Ceylon has discouraged them from settling in the country. When it is considered that lands in Ceylon are liable to an assessment only of one-tenth of the produce, while those on the continent are commonly assessed at one-third or one-half, there is adequate inducement for the agricultural classes in Malabar to seek a settlement in the Island, and for those who possess capital to employ it in the repairs of tanks, by which extensive tracts of waste lands would be reclaimed and rendered productive. At present the high rates of assessment on the continent, although rigorously imposed, leave the landholders at liberty to carry their labour to any market that offers inducement, and to realize a subsistence from extraneous sources.

All lands in the maritime provinces of Ceylon are resumable for public purposes under a regulation of Government, by which it is provided that such resumptions shall be made under an act of the Governor in Council, and the terms of payment adjusted by arbitration.

Regulation of Government, No. 15 of 1822.

In the Kandyan provinces lands may be resumed for public purposes on the authority of the Governor alone, compensation being granted to the proprietors on a valuation made by the Commissioner of Revenue, with the concurrence of the Board of Commissioners. The inhabitants whose lands have been resumed have in some instances declined to accede to the terms offered, or have remonstrated against the resumption, upon any terms, of their hereditary possessions.

From the state of society in Ceylon, this removal from their villages, and the occupation of lands in another part of the country, may involve a considerable change of habit to the landholders. Some new service attaching to the land may have to be performed, under other authorities, and where they may be unable to obtain the assistance of their relatives and neighbours in the tillage of their lands, or in the performance of occasional service for them.

There are three distinct classes of persons who are employed in the civil administration of the country. The gentlemen of the civil service who are sent out from England as "writers" form the first, and from this class are selected the heads of departments in Colombo; the provincial judges and collectors, the judicial and revenue commissioners in Kandy, and the agents of Government in two of the Kandyan provinces.

The junior civil servants are employed as assistants to the collectors of districts, or in the office of the chief secretary to Government, and are appointed to responsible situations after having passed an examination in one of the native languages (Cingalese or Malabar).

The next class are the provincial magistrates, of whom there are sixteen; and the clerks in public offices, who are Europeans, or their descendants, settled in the country.

The third class are the native officers, the highest of whom in the maritime provinces are the modeliars of korles or districts, the interpreters to the Courts of justice, and the modeliars and interpreters of "*cutcherries*," or collector's offices.

According to the ancient usage of the country, the modeliars were the commanders of the lascoryns or district militia, and they are still so recognized, although at present chiefly employed in the

civil administration of the country, and in the execution of public works; there are gradations of native officers in authority under them. The civil officers employed by the native Government were superseded by the Dutch. In the Kandyan provinces they are still retained under various designations, and through every gradation of rank, although their functions are now exercised in subordination to the European authorities in the districts. These native appointments are still regulated in a great degree by custom and caste

Besides the headmen of the establishment, who are numerous, and the "titular" headmen, who receive no emolument from that appointment, there are, according to custom, headmen appointed to each class or caste. The perquisites employed by them have for the most part been abolished, although they are still retained by some. The modeliars of the caste of fishermen are allowed a portion of the fish caught. Where the appointments have not been expressly made, the duty of representing the caste, and of distributing the public labour or service which the people are required to perform, devolves upon the headmen of the establishment, who are chiefly selected from the Vellale or agricultural caste, the most numerous and influential. The headmen at the seats of magistracy are generally acquainted with the English language, but the modeliars and the headmen of korales and castes are often ignorant of it. In 1828 a regulation was made that no native headman should in future be appointed who could not read and write the English language.

From habit and prejudice, as well as from intesest, the headmen uphold the distinctions of caste, and counteract the attempts of the subordinate castes to improve their condition. The Government has brought forward some individuals belonging to inferior castes, whose qualifications have entitled them to advancement, although it has generally favoured the pretensions of the higher castes, particularly the Vellales. The modeliar of the caste of Washermen has thus been advanced to the office of Cashier of the Treasury. In general the rivalry between the inferior castes is as great as the jealousy of the higher towards the lower castes. The contests of the Barber and Washer castes have been terminated only by a recent decision of the Courts, which have rejected the pretensions of the Washermen to demand the services of the Barbers.

From the more recent acquirement of the Kandyan country, and the nature of the institutions which exist in it, this submission to the prejudices of the people is even more absolute, although the disposition of the Government and its officers to relax the authority of the chiefs has tended to weaken the dependence of the lower castes upon the higher, and to render them impatient of the control and subjection in which they have been held. In the maritime as well as in the Kandyan provinces this spirit has given rise to numerous complaints and representations, which have been addressed to my colleagues and myself by the inhabitants of all classes, in which the headmen have only joined when their own privileges have been concerned. The degradation of some Kandyan castes has been carried to the utmost limit of servility. The lowest are the Rhodias, a class of outcasts, who are excluded from all communion with the others, and inhabit villages of their own. Persons were thus degraded for their crimes, and the degradation was entailed on their posterity.

When vacancies occur, all appointments to the higher offices are provisionally made by the Governor, who selects the candidates according to their seniority when otherwise qualified, such appointments being subject to confirmation by the Secretary of State.

The magistrates and clerks in public offices are also appointed by the Governor. The modeliars and principal headmen hold their appointments under warrant of the Governor, and are recommended to him by the commissioner of revenue, the provincial headman being recommended by the collectors of districts.

In the Kandyan provinces appointments are similarly made by the Governor, on the recommendation of the Board of Commissioners, and include the chiefs or principal headmen of provinces and departments, the chief of temples, and the priests in the colleges or wihares.

In the Cingalese provinces the headmen are for the most part stipendary, and in the Kandyan provinces they are remunerated by remission of taxes for themselves and their retainers. In the northern or Malabar provinces they receive, with a few exceptions, no authorized remuneration, and the headmen of villages and castes are commonly appointed on the nomination of the inhabitants. There is, however, no established form of election, a deputation of the villagers making a return to the magistrate of the candidate approved of by them.

The number of principal headmen in the Cingalese districts amount to 243, those in the Malabar districts to 112, and those in the Kandyan provinces to 47. These numbers include the functionaries appointed to provinces or departments, but not the headmen of villages, who are more numerous.

For a practical view of the system under which the Government of Ceylon has been administered, I can refer to some extracts made from the Minutes of the proceedings of the Board of Commissioners at Kandy, to the copies of Reports and Circuit Diaries of the district collectors, to the evidence of the European functionaries, and to that of the native chiefs and headmen.

Of the representations of the native inhabitants, addressed to my colleagues and myself, in the form of petitions, many, although personal cases of complaint, elucidate correctly the effects of the regulations in force. Their statements are often overcharged, but they contain many facts of importance, which have been confirmed on inquiry, and they are deserving of attention, as well from the nature of the grievances complained of, as from the intelligent manner in which the effects of the regulations are frequently explained.

After a careful review of the system, I am bound to report my opinion, that while it is free from some of the prominent objections to those which have been adopted on the continent of India, the general spirit and tendency of it has been unfavourable to the improvement of the country. Some beneficial measures have from time to time been adopted but no regular control has been exercised over the acts and proceedings of the Governor, nor has his recognized responsibility for the measures adopted by him on his own judgment been rendered practically efficient. From the remoteness of the settlement, the nature of the Government, and the absence of all open discussion of public affairs, the Governor has been almost the exclusive organ through whom authentic information has been derived, and with whom any measures of improvement have originated. Without

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his co-operation no beneficial change could be effected, and the inhabitants have been accustomed to regard his authority as absolute. When unpopular measures have been enforced by him, they have usually remonstrated against them, and in some instance have resisted their operation.

As measures have been proposed and adopted without any previous notice, the people have had no opportunity of explaining their objections to the passing of regulations which have injuriously affected their interests. Besides the system of monopoly maintained, and in some instances extended, by the Government, the power exercised by the Governor of regulating duties and imposing taxes has been injurious to commerce and to the influx and accumulation of capital.

The claims which have been enforced by the Government to the labour of the native inhabitants have been also very unfavourable to agricultural industry and improvement, except in cases where that labour has been applied in the repairs or execution of works required for the cultivation of rice; and it is deserving of remark, that this branch of agriculture is less prosperous in Ceylon than on the continent, where the land-tax is considerably higher, and from whence large quantities of grain are annually imported into the Island for consumption.

These claims to public labour have given an interest to Government in upholding the distinctions of caste, and the privileges of the headmen, through whom it has exercised an indefinite control over the people and their resources.

The maintenance of separate independent establishments for the maritime and the Kandyan provinces has been impolitic, in the check it has opposed to that assimilation which it is on every account desirable to promote between the various classes of whom the population is composed. By maintaining a separate Government at Kandy, the influence of the chiefs has been upheld to the prejudice, in some instances, of the people.

The Kandyan districts which are situated below the mountains have a nearer and more natural connection with those of the coast, with which they maintain a trading intercourse; and as the whole country is divided into a greater number of districts than are required, it will, on every account, be desirable to incorporate them

Upon inspection of the old charts, it will be seen that the boundaries of the districts are very imperfectly regulated, either with reference to the convenience of the inhabitants or to the transaction of public business.

In placing the whole Island under the administration of the Governor and Council, all laws should in future be promulgated in their name, and entitled "Ordinances of the Governor in Council;" and in incorporating the sixteen provinces or districts now superintended by as many Government Agents and collectors under the authority of the Governor or of the Governor in Council, the country should be divided into five provinces, the principal stations being at Colombo, Galle, Jaffnapatam, Trincomalee and Kandy, and a Government Agent should be appointed to each of these stations, and such European and native assistants as may be required.

In a distant settlement, where reference cannot promptly be made to higher authority, and where the people are unprepared for popular

institutions, a discretionary authority, to be exercised under due responsibility, may be necessarily confided to the Governor; but as the exercise of that discretion could only be required on extraordinary occasions, it would be desirable that the ordinary transactions of the Government should be conducted, as far as possible, through established and responsible departments, acting under instructions from, and subject to the control of, the executive departments in England.

The officers of these departments would be liable to suspension for misconduct, but not otherwise removable, as at present, at the pleasure of the Governor. A strict adherence to these instructions would prevent irregularities and promote an adherence to system, without precluding a departure from them in any instance in which the Governor might consider in his duty to sanction it, such deviation being immediately reported, with the reasons for it, by the Governor, and his authority in writing transmitted with the records or accounts of the executive department.

For the assistance of the Governor in all details relative to the revenues and disbursments of the Island, and to supersede the appointment of committees for investigating these matters, there should be constituted an "*Executive Council*," to be composed of the Secretary to Government, the Treasurer of the Island, the Auditor General, the Surveyor General, the Collector of Customs at Colombo, and the Government Agent for that district.

Returns of the revenue and disbursements, should be brought before them, and the opinions of the members recorded. The board should have authority to call for information when required, and the minutes of their proceedings should be transmitted by the Governor to the Secretary of State.

When the labour of the inhabitants may be required on public works, they should be hired voluntarily; and if they cannot be engaged in the places where the work is to be performed, advertisements should be published throughout the country, and even on the neighbouring coasts of India, announcing the nature, the terms, and the duration of the employment. If these measures should fail, which is not probable, the Governor should have no authority without a legislative enactment to press labourers or workmen, nor to regulate their wages in any case, nor to employ them gratuitously or compulsorily with reference either to caste or custom. Excepting on special and urgent occasions, when voluntary labourers cannot be procured, a legal sanction for calling out the inhabitants should not be granted, and even in extreme cases other resources have been found.

The difficulty of procuring coolies or pioneers during the Kandyan war induced the Government to raise a body of men by voluntary enlistment upon the continent, and who, from their great utility, are still employed.

It may further be remarked, in support of the opinion that the natives of India are not indisposed to emigrate, that numbers annually come over to Ceylon to seek employment during the pearl fisheries, and in the coasting trade of the Island.

The regulations proposed would strictly apply to the ordinary and contingent demands for labourers, and especially in collecting cinnamon, conveying stores, and in constructing and repairing roads, bridges, and Government buildings.

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In recommending the appointment of an Executive Council, I have had in view to provide for the future legislation of the Island, apart from those duties of an Executive character, which have hitherto been exercised by the Governor with or without the advice of his council.

In the composition of a Colonial Legislative Council, it is necessary to provide (so far as the nature of so imperfect an institution may admit), for the intelligent and independent discharge of its functions.

In a community composed of different races, who are attached to ancient customs, and attentive to the effect of innovation, it is indespensable that changes in the law should not be adopted precipitately, and without their provisions being previously known to and considered by the people.

In consequence of the representations made by the native inhabitants, conferences were held by me with the principal chiefs, priests and headmen at Kandy and Colombo, and, in my progress through the country, with the people of all classes. It was generally admitted by them, that to secure the due administration of justice, and to protect the rights of the people, a digest of the laws and customs of the Island ought to be prepared for the guidance of the courts of justice. The existence of particular customs recognised by different classes of people, the uncertainty that prevails with regard to them, and the spirit and effect of several regulations which have been enforced by the European Governments on the alleged authority of custom, suggest the necessity of such a revision; and in Kandy, where the prejudices of the people are the strongest, no objection has been urged by the chiefs to the adoption of a code which would be applicable in common to the maritime and to the Kandyan provinces. It was submitted, however, that the sense of the people should be previously collected in regard to its provisions. The higher class of natives are the ordinary expounders of the prevailing customs, and are employed as assessors in the Kandyan Courts, as they formerly were as members of Dutch Landraad Courts, but the headmen of the villages are generally considered, and admitted by the chiefs to be, more conversant with the traditional customs of the country than themselves. A desire was accordingly expressed by the chiefs that some of the most intelligent inhabitants of every class (chosen principally from the village headmen) should be assembled for the purpose of considering the state of the laws, and the changes it would be desirable to adopt.

Although the chiefs themselves are for the most part exempt from the public burthens, they admitted that the people were much discontented, especially from the demands that have been made upon their services and labour and which have recently led in one instance to open resistance. It was also alleged that these demands on their services, which had in some instances exceeded those to which the people had been liable under the native Government, had been enforced without regard to the ancient customs of the country, or consideration of the claims and condition of individuals.

On these and other questions of general importance the people are entitled to expect that their interests and wishes may be attended to, and their rights protected; and although the ignorance and

prejudice which still prevail generally throughout the country may preclude the adoption of their views upon all subjects, it would be consistent with the policy of a liberal Government that they should have an opportunity of freely communicating their opinions of the effects of the legislative changes that may be proposed. To attain this object, and to obviate the objections that may be urged against involving the Governor in the public discussion of the Ordinances during the stages of their progress, it may be deemed necessary in constituting a Legislative Council to provide that the Governor should take no part in its deliberations.

To secure as great a degree of efficiency as may be attainable, this body should be composed of a larger number of the principal officers of Government, civil and military, than have hitherto been appointed to the Council. The heads of general departments at the seat of Government, the attorney-general, and the Government Agent of the Colombo district, would properly be appointed to it, provision being at once made for the admission of any respectable inhabitants, European or native, whom His Majesty might hereafter be pleased to appoint.

It would be desirable that each member should have the privilege of proposing measures for consideration, and that the Council should have authority to call for public papers, and to take evidence.

Measures recommended to their consideration by the Governor should, in the same manner, be submitted to deliberate investigation.

When the measures proposed have been approved by a majority of the Council, bills founded upon them should be drafted by the law-officers of the Government, and printed for general information.

The petitions of the inhabitants, when respectfully addressed, and presented by the members, should be recorded by the Council, and it would facilitate inquiry and promote useful discussion if the Government Agents were authorized, at the requisition of the Council, to take information in their respective districts; and in order to afford the Governor and Council at all times the fullest information of the state of the country, the regulations of 1808 requiring the collectors to make circuits through their districts should be revived, and the reports of the Government Agents to the Governor should be laid before the Council

When bills have been passed by the Council, they should be laid before the Governor, and submitted by him to the Judges of the Supreme Court for their opinion, whether they have been framed in conformity to the principle on which it might be His Majesty's pleasure that all changes in the colonial laws should be regulated ; and previous to their confirmation by the Governor, the judges should be required to certify that they do not contain provisions repugnant to the Acts of Parliament, or to the Orders of His Majesty in Council.

When passed by the Governor they should have the force of provisional laws or ordinances until the p easure of His Majesty might be known, excepting where new taxes or duties may be imposed, in which case their confirmation by His Majesty should be previously obtained.

To provide as far as possible for the independent discharge of their functions, the members of the Legislative Council should be required to make oath not to disclose the opinions of each other.

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If the bills passed by the Legislative Council should be rejected by the Governor, or if those proposed by him should be thrown out by a majority of the council, a report of the proceedings should be forwarded to the Secretary of State; and if the proposed ordinances should be approved by the King, they should be returned to the Governor with His Majesty's command for their promulgation in the Island.

In any case where the judges had certified that a bill contained clauses which the Governor and Council were incompetent to pass, and which it might nevertheless be desirable to recommend for adoption, the proposed law should be transmitted to England with such explanations as would enable the Government of His Majesty to decide whether to confirm it by an Order in Council, or to obtain the authority of an Act of Parliament for its confirmation.

Without involving the Governor in the discussions of the Council, or exposing its members to any influence unfavourable to the independent discharge of their legislative functions, provision may be made by these arrangements for the gradual amelioration of the colonial institutions, for that publicity in regard to the affairs of the Island which will conciliate public confidence, and for such deliberation in regulating them as will protect the people from precipitate changes of the laws affecting their rights and interests.

Such a Council is not proposed as an institution calculated in itself to provide effectually for the legislation of the Island at a more advanced stage of its progress. It will tend, however, to remove some of the obstacles which have retarded the improvement of a settlement possessed of great natural resources, and it would eventually constitute an essential part of any colonial legislature for which the Island may be prepared at a future period. In the meantime the efficiency of the Legislative Council may be improved from time to time by the appoinment to it of respectable and influential inhabitants of the Island, who would give weight to its decisions, and support and stability to the Government.

In regard to the existing laws and customs of the maritime and the Kandyan provinces, I would in this place observe, that the recognition of various and conflicting systems which are applicable to the inhabitants of particular provinces, or to different classes of persons in the same place, has led to much practical inconvenience, and has in some instances been productive of injustice.

On introducing a more comprehensive system, a gradual approximation to the principles of English law would not be incompatible with the maintenance of such parts of the Dutch and native laws as may be just in themselves and congenial to the habits of the people, keeping in view that the laws of Holland, although extended in practice by the Courts to the native Cingalese, apply more particularly to Europeans and their descendants, who are commonly called "Burghers," and who have considered themselves exempt from the operation of those native customs which have been upheld and enforced by the Government in the exercise of an arbitrary authority over the native Cingalese.

In recommending a revision of the civil laws of Ceylon, with a view to adapt them more generally to the condition and circumstances of the people, it will be incumbent on the Government to commence

by renouncing in express terms all claims to the labour and services of the native inhabitants, and to place them, in respect to their civil rights, upon an equal footing with Europeans and all other descriptions of persons who may settle in the country.

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The customs and usages of particular classes may continue to be recognized on adequate proof of them being adduced, and where their maintenance may not be incompatible with the rights of others.

When the distinctions of caste have ceased to be countenanced by the Government, the unrestricted intercourse of the various classes will gradually obtain; and to improve the moral habits of the people, it will be desirable to revise and extend the marriage laws which have been established in some districts. In the Kandyan provinces the union of one woman with several brothers is a custom still recognised, and which has led, it is apprehended, to many cases of infanticide.

The laws in force for regulating the inheritance and distribution of property, which are various and complicated, should also, as far as possible, be assimilated, a measure which may be connected with a reform of the system of land tenures under which the Government still claims the services of the Kandyan people.

There is reason to infer that some of the subordinate castes were originally slaves, who, in the revolutions of the country, were left to provide for their own support and were recognised on the footing of servile castes, deriving their subsistence from the land; and in the Kandyan provinces it has been a custom for debtors to become the slaves of their creditors. Personal slavery, however, is nearly extinct in the Cingalese provinces, but it still exists among the Malabars in the northern districts of Ceylon. The number of slaves in the district of Jaffna, according to the returns of 1824, was 15,350. The number of domestic slaves throughout the maritime provinces does not exceed 1,000, and they are chiefly the property of the Dutch inhabitants or or their descendants, who in 1816 agreed to enfranchise the children born of them after that date.

The slaves in the Malabar districts were first registered in 1806, and in 1818 provision was made for annulling all joint ownership in slaves, and for enabling all slaves to redeem their freedom by purchase.

See Regulation of Government, No. 9 of 1818, clause 15.

To lead to the abolition of slavery, a regulation was passed in 1821 for the emancipation of all female slave children, by purchase at their birth; the Government engaging to pay to their owners the sum of two or three Rixdollars, according to the caste of the mother.

Ibid, clause 24.
Ibid, No. 8 of 1821.
Covia caste, Rixdollars 3.
Nallua, or Pallua caste, Rixdollars 2.

The number of children who have been registered as free by the subscribers to the address to the Prince Regent, in 1816, is 96; 50 male and 46 female children. The number of female children who in 1829 had been purchased by Government under regulation of 1821, was 2,211; and the number of slaves who had purchased their freedom under the regulation of 1818, either by labour or public works or otherwise, was 504; or males 200, females 171, and children 133.

By the provisions of this law, the value of the slave is determined

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Regulation of Government, No. 9 of 1818, clause 24.

by arbitrators; and it may be objected to the regulation of 1821, that the Government should have fixed the sum to be paid for each female child with reference to caste, and at so low a rate as three Rixdollars (or 4*s.* 6*d.*) for the highest, which sum the owner was bound to accept. It would be more just that, as in the case of adult slaves purchasing their freedom, arbitrators should be appointed to determine the rate.

Latterly the Malabar slaves have not come forward in any numbers to redeem their freedom by purchase, but many children have been enfranchised under the regulations. These laws are objected to by the Malabar proprietors, who have complained of the compulsory manumission of their slaves; but as the gradual extinction of slavery in Ceylon may be accomplished with so little sacrifice, the regulations of 1818 and 1821, with some modifications, should be maintained, and their operation extended to the Kandyan provinces, where personal slavery to a limited extent also prevails.

With regard to the criminal law, I will only in this place observe, that the provisions of the Act of Parliament (9 Geo 4, c. 74), have been taken as the basis of those alterations which have been recently proposed by the Judges of Ceylon; and as that Act was expressly framed for India, there are no circumstances of a peculiar kind that would render it inapplicable to Ceylon, and much advantage would be derived from the recognition of one uniform principle of the criminal law to be administered throughout the British possessions in the East.

From the great extent of unoccupied land in Ceylon, it might have been expected that the invitations held out by the Government during the last twenty years would have encouraged many persons to settle in the country; but the regulations of Government, which opened the Island to the enterprize of European settlers in 1812, have hitherto failed, as well as the attempts to promote an influx of Indian settlers from the continent.

European colonization had not been encouraged by the Portuguese and Dutch Governments. Under the Dutch, the public functionaries acquired property to some extent, chiefly in houses and plantations near the towns, or they invested their funds in mortgage on such property, and the employment of a limited capital was thus secured to the country.

Many of the Dutch having removed with their property to Batavia after the capture, they were not replaced by English settlers, and the savings of the English functionaries have usually been remitted to Europe, or invested in the Government debentures, at high interest, which were issued for their accommodation.

The regulations of the service prohibit the civil servants from engaging in trade, and the nature of their duties would have precluded them from giving much attention to agricultural pursuits, had they not otherwise been discouraged by the fiscal regulations, the Government monopolies, and restrictions on trade, and the interference with the free disposal of native labour. To these discourgements may mainly be ascribed the ill success of the few individuals, unconnected with the public service, who have attemped to colonize.

While Ceylon was under the Government of Madras, an industrious class of natives was introduced from the continent, some of whom

have settled in the Island; but their capital has been chiefly employed in trade, and the number is less considerable at present than might have been expected. I have already observed, that native settlers of every description have apparently been discouraged by their liability to compulsory demands on them for Government labour. The comparatively low rents imposed by Government on lands in Ceylon might otherwise have attracted them.

In the present state of the country there is no private capital applicable to the restoration of ancient works, or the clearing of lands; nor can the Government afford assistance to any extent in the execution of these useful works. The policy, therefore, of giving the utmost encouragement to settlers from abroad is unquestionable. In giving effect to the measure of 1812, it appears to me of primary importance to remove the distinctions which still subsist in the terms and conditions on which lands are granted to Europeans, and to the natives of Ceylon and India. These distinctions have been the occasion of jealousy and ill-will. Where extensive tracts of land are applied for either by European or by native settlers, they should be considered alone with reference to the means of the applicant for executing the works required for the cultivation of the land, such as clearing the forests, and repairing or constucting the tanks by which the land may be irrigated.

Regulation of Government, No. 2 of 1822.

By a regulation, passed in the year 1822, for the preservation of timber, a tax of one-tenth of the value of forest trees, and of one-eighth of the value of jacktrees growing in the gardens, was imposed, if cut down; and such timber could only be cut by a license from the collector. This unjust and impolitic regulation ought to be repealed, by which the timber trade would be encouraged, and the clearing of lands promoted. It would also accelerate the improvement of the country if the uncleared lands now liable to an assessment of one-tenth of their produce, when cultivated, should either be sold or granted in freehold; and no restrictions should be imposed on persons of any class or caste who may be desirous of settling in the country.

In the case of European settlers, all claims to the assistance or favour of Government should be discountenanced, experience having shown that such dependence, where unjust towards others, has been unfavourable to the settlers themselves, from the jealousy it has excited in the native landholders. With the removal of all restrictions on trade, on the free disposal of labour, and the liberty of cultivating all descriptions of produce, I anticipate that the regulations recommended for the granting of lands will include every necessary encouragement which the Government can be required to hold out for the settlement and improvement of the country.

The application of capital to agriculture will gradually remove the inconvenience arising from the poverty of the cultivators and the subdivision of lands.

The rice-lands are usually cultivated in fields of moderate extent, and the produce divided; but it would be in the power of intelligent persons possessing capital to extend the farms, and to execute works that would augment their produce.

It does not appear that the natives are indisposed to hire their

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labour on moderate terms, where regular employment is held out to them. In Colombo the constant demand for servants and labourers has led numbers to engage in voluntary employment ; and the same effect has been observed wherever a constant demand has existed. A competition has even arisen amongs the labourers for employment on reduced wages.

In the country, the possession of small portions of land contributeing to the maintenance of their families, although creating a feeling of independence, has enabled them to work upon terms which are inadequate to support labourers who have no other resource than their daily wages; wages must be expected to rise with the diminution of this resource. The people are generally anxious to acquire land, and extremely jealous of all encroachment on their hereditary possessions; and as there is no effective demand for labour throughout the country, and no legal provision for the indigent and infirm poor, the practical effect of the system has been to render the claims of Government for relief less frequent and extensive than if the people had not possessed such a resource.

Occasional assistance has been afforded by Government when the crops have failed, by the distribution of grain for subsistence, but this relief has been granted only in seasons of famine or scarcity ; and the advances of grain made either for subsistence or for re-sowing the land, have been usually repaid to the Government out of the ensuing crop, with an interest of 25 per cent. As private speculators have usually claimed 50 per cent., to which the landholders are often obliged to submit, these terms have been acceptable ; and the Government has often rejected applications for advances on these conditions.

The itinerant traders, on whom the people of the interior depend for supplies, (there being no market towns), barter for the produce with an exorbitant profit to themselves ; and the subsistence of the landholder is thus reduced to a miserable pittance.

The Government has at all times drawn largely on the resources of the people in the taxes and duties it has imposed, in the monopolies it has enforced, and the gratuitous services it has exacted. When it is considered that in some places the peasantry have laboured on the roads, without wages or subsistence, during several months of the year, it is evident that the possession of land for their support would alone have enabled them to sustain the burthen.

The constant demand for voluntary labourers on public works, and in the Government service, would, if justly remunerated, constitute in itself an effective stimulus to industry, which the present coercive system has chiefly tended to discourage.

The peasantry of India, as well as Ceylon, generally possess land, from which they derive part of their subsistence and the wages of labour in the neighbouring provinces of the continent are as low as in Ceylon, and in some instances lower ; any considerable rise would therefore be checked by the competition of strangers. The wages of common labourers vary in different parts of the Island from *6d.* a day in Colombo to *3d.* and *4½d.* a day in the country. The Government has interfered to fix these rates when requiring labourers ; but higher demands are made to private employers, according to circumstances. Those who possess small portions of land rarely derive their support

from them exclusively, but employ themselves in the fisheries, in trade and manufactures, and in the petty traffic of the country; and from the small amount of their individual gains there is reason to conclude, that if they could obtain regular employment near their homes, or even at a distance, from 6*d.* to 1*s.* a day would be generally acceptable to them. 1831. Colebrooke's Report.

The wages of mechanics and artizans are proportionally higher than those of labourers, but still extremely moderate; and from the frugal habits of the natives, and the resource derived from their lands, a slight augmentation of these wages would add materially to their comforts.

The minute sub-division of lands has been accelerated in the maritime provinces by the Dutch law of inheritance. In fields, gardens and plantations which are farmed, or held in joint ownership, the interest of an individual proprietor is often limited to such fractional portions as are valued at a few pence. For example, the inheritance of one person will consist, in land, of nine-tenths of a seer of rice; in trees, of five-twelfths of a cocoanut tree, and two-thirds of a jack tree.

The attachment of the natives to these possessions is evinced by the fact, that they are often the subject of protracted law suits.

There are a few native landholders in the Colombo district who possess about 1,000 acres each; but under the laws of inheritance these will in time be subdivided.

The employment of capital in agriculture, as it would promote the cultivation of waste lands would, as I have before observed, also tend to re-unite property in farms, without necessarily disturbing the interests of the numerous claimants amongst whom the rent would be divided.

In the south-western division of the Island, the cinnamon, pepper, cocoa-nut and coffee plantations, would claim attention; and in the northern division, cotton, opium and tobacco. By extending the cultivation of these and other productions the internal markets for grain would be encouraged; the cinnamon gardens planted by the Dutch, which have been abandoned, would be re-occupied, and pepper, which is now imported, would be re-cultivated for exportation.

The manufacture of cocoanut oil, of coir rope and cable, and the distilation of arrack or rum from sugar, would become objects of general speculation, as they are now a source of profit to a few European merchants.

Europeans of the mechanical and labouring classes would find no inducement to settle in Ceylon, unless possessed of sufficient skill and capital to become tradesmen, farmers or master mechanics, a description of persons who would be of great utility in the country.

The wealth acquired by persons of this class at the presidencies of India has been the effect of the high premium derived from their superior industry and intergrity, and to this class may almost exclusively be ascribed the introduction of several useful arts, which the natives have learned to imitate.

The low wages of labour in the principal towns is favourable to the success of an industrious settler of this class, and the cheapness of provisions and of house rent, is calculated to diminish the difficulties attending a first settlement.

Regulation of Government, No. 4. of 1829, clause 4.

A regulation of Government recently passed in Ceylon, for releasing the natives from compulsory demands on their labour when employed in plantations of certain colonial produce, is liable to various objections. From the diversity of soil and climate, some situations are better adapted than others to particular productions; but in any case there can be no advantage, in the present state of the markets, from forcing the cultivation of coffee, sugar, and cotton. The regulation in question is confined to the maritime provinces, and the revenue commissioner at Kandy has stated other objections to its application in the interior, which it would be my duty to urge upon attention, if I had not already recommended the liberation of the inhabitants at large from all compulsory services.

Although European skill and capital may lead to improvements, and afford profitable returns in various branches of industry and manufactures, it is not to be expected that great advantages can be monopolized by that class of settlers. The profits which satisfy the natives would not attract European competitors to the employments already in their hands, excepting where improvements can be introduced, and as the natives are prepared to engage in any undertaking the success of which has been sufficiently assured by the example of others, the first projectors could not expect to retain a premium on their speculations beyond the ordinary rates of profit in the country. The views of European speculators would therefore be limited eventually to a moderate return upon their capital invested in local improvements, of which they would be better assured by co-operating with the natives, and profiting by their experience and frugal management, than by engaging in any exclusive undertaking. Although it is desirable that speculators should entertain moderate views, it may be expected that the returns upon capital will continue for some time to be higher than in Europe, and that the demand will be permanent.

If European colonization in Ceylon should be effectually promoted, the benefits to be expected from it would depend, in a greater degree, on the impartial spirit of the Government, and the discontinuance of those distinctions in society which have hitherto led the natives to regard Europeans and their descendants as a caste imbued with many of their own prejudices, and entitled to certain privileges from which they are systematically excluded. The nature of these prejudices may be inferred from the fact, that they have constituted the sole difficulty in uniting the different classes upon juries.

The public service should be freely open to all classes of persons according to their qualifications; the exclusive principle of the civil service should be relaxed, and the means of education held out to the natives whereby they may in time qualify themselves for holding some of the higher appointments.

On its present footing the civil service consists of thirty-eight effective members, the senior of whom are exclusively employed, as I have before stated, as the heads of civil departments, as collectors of districts, and as provincial judges, while the junior civil servants are employed as assistants to the collectors, or in the office of the chief secretary to Government.

There are twenty-five principal appointments in the Island, to

which the gentlemen of the civil service are alone eligible. (k) The means of selection therefore are much too limited, and most of the Government Agencies for the Kandyan provinces have accordingly been held by officers selected from the regiments serving in Ceylon, who have performed these duties efficiently and creditably upon small salaries in addition to their military allowances. (i)

The descendants of European settlers have been employed as provincial magistrates and clerks in the public offices. The establishment of schools even on their present limited scale has enabled the natives to qualify themselves for these situations; and the European clerks, whose services in the different offices have been extremely useful, claim the attention of Government to their present discouraging prospects.

The subordinate employment of the natives in every department connected with the administration of the districts has given them also much practical experience, and has enabled them to acquire a degree of influence which, under liberal encouragements, might be exerted in support of the views of Government for the improvement of the country. Being usually selected from higher castes, they foster the prejudices of the people in favour of a system from which the ascendancy of the privilleged classes is derived.

As the qualification of natives of respectability to fill the higher appointments under Government cannot be immediately expected, it would not be expedient to abolish at once the various offices of a subordinate nature now held by them throughout the country, even though their functions should be changed. The headmen of korles and districts would cease to be employed in pressing the people and superintending their labour on public works, but they would still be retained in the exercise of civil authority as subordinate magistrates, and as officers of the native militia (lascoryns).

From the peculiar constitution of the village communities, composed as they often are of people belonging to particular castes, their ancient usages may be preserved; and it would be satisfactory to them

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(k) *Offices held by Civil Servants:*—
Commissioner of Revenue.
Vice Treasurer and Commissioner of Stamps.
Auditor and Accountant-general.
Paymaster-general.
Deputy Secretary to Government.
Superintendent of Cinnamon Plantations.
Collector of Customs, Colombo.
Sitting Magistrate, Colombo.
Collector of Colombo.
Ditto Galle.
Ditto Tangalle.
Ditto Batticaloa.
Ditto Trincomalee.
Ditto Jaffna.
Ditto Manaar.
Ditto Chilaw.
Provincial Judge of Colombo.
Provincial Judge of Galle and Matura.
Ditto Jaffna.
Ditto Trincomalee.
Revenue Commissioner of Kandy.
Judicial ditto at Kandy.
Government Agent for Seven Korles.
Ditto Saffragam.
Fiscal and Magistrate of Jaffna.

(i) *Offices held by Military Persons:*—
Agent of Govt. for Uva and Bintenne
Ditto Three Korles.
Ditto Four Korles.
Ditto Matale.
Ditto Harasiapattoo.
Ditto Hewahette.
Ditto Lower Uwa and Wellasse.
Judicial Agent for the Seven Korles.
Sitting Magistrate at Kandy.

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if the appointment of the headman of each village community or parish should be made on the nomination of the inhabitants who are proprietors of land or houses. The qualifications for the office of village headman should be the possession of property in the village to a certain amount; and where a vacancy occurs, the Government Agent, or his assistant, in the district, should collect the votes, and the appointment should be made in conformity to the wishes of the majority. In the district of Jaffna, where the headmen are thus nominated, the elections have been made without regularity or form; it will, therefore, be necessary to define the qualifications of electors, and to regulate the mode in which the votes are to be taken; also to provide that in cases where corruption has been practised, the nomination should be set aside, and the person disqualified from holding the office. The office of headman of a village should be subject to renewal every three years.

Of the subordinate places held by the natives in the several departments of Government, the number should be eventually reduced. By encouraging the native families to be competitors for petty employments, for which they enjoy small salaries or an exemption from taxes, they have neglected other pursuits by which they might have improved their resources and benefited the country from their exertions. The offices which may be retained should be adequately remunerated, and declared open to all classes of the inhabitants, without reference to caste or to other qualifications than respectability and fitness for employment. A competent knowledge of the English language should however be required in the principal native functionaries throughout the country. The prospect of future advancement to situations now exclusively held by Europeans will constitute a most powerful inducement with the natives of high caste to relinquish many absurd prejudices, and to qualifiy themselves for general employment.

With this view, it would be highly expedient that the intention of the Government to open the civil service to His Majesty's native subjects should be publicly declared.

From the nature of the employments now open to the civil servants, some knowledge of the general principles of law would be of great advantage, as well as the acquirement of such information on subjects of trade and finance as would lead them to just views of the effects of the system under which the Island has been administered.

There are no means at present of insuring these qualifications in the candidates for public employment; and to aid the disposition already evinced by the natives to cultivate European attainments, some support from the Government will still be required. It would be impracticable for individuals, even of the most respectable classes, to support the expenses attending the acquirement of a liberal education in Europe, and, if attainable, the advantages of affording to them the means of education in their own country are in many respects greater.

The benefits of the measure formerly adopted by Government of sending young Cingalese to Europe, and maintaining them at the English universities, were not commensurate with the expense incurred, while the proficiency of several of the young men who have been educated in the seminaries formed in Ceylon by the Christian societies attest the superior advantages to be derived from local instruction, the expenses of which are inconsiderable.

In the plan of a college, which was projected in 1828 by the American missionaries at Jaffna, it was estimated that 25 dollars, or 5*l.* sterling, per annum, would, upon their plan, sufficiently provide for the subsistence, clothing, and contingent expenses of a native student, and that the rudiments of education might be acquired even on more moderate terms.

The village schools which were established by the Dutch Government had exclusively for their object the conversion of the natives to Protestant Christianity; and in the district of Colombo, the number of nominal Protestants who have been instructed in these schools, or in those of the missionary societies, considerably exceeds that of any other class of the population.*

The Government schools have continued to be maintained by the British Government, but they are extremely defective and inefficient. They are placed under the superintendence of one of the Colonial Chaplains, as "Principal of Schools." Another clergyman holds the office of head-master in the principal seminary at Colombo.

* District of Colombo.

Protestants	83,756
Roman Catholics	38,155
Mahomedans	14,847
Bhoodists, &c	78,602
	215,360

The number of Government schools nominally maintained in the Cingalese provinces is ninety. There are but four remaining in the Malabar districts, and there are none in the Kandyan provinces. The schoolmasters are not required to understand the English language, of which many are wholly ignorant, and they are often extremely unfit for their situations. Nothing is taught in the schools but reading in the native languages, and writing in the native character; and as the control exercised is insufficient to secure the attendance either of the masters or of the scholars, many abuses prevail, and the Government schools in several instances exist only in name; children being assembled occasionally for inspection, many of whom had received instruction in the schools of the missionaries, of which the Government schoolmasters are alleged to be jealous.

The expense of the establishment of schools since 1806, when it was reduced, has amounted to about 2,000*l.* per annum. The schoolmasters, who receive a small stipend of 6*l.* 6*s.* per annum, derive, a further emolument from fees on the registry of native marriages, a duty which is assigned to them by the Government, and is very negligently performed.

A similar establishment of Government schools was formerly maintained in the northern districts, but the schoolmasters having become totally inefficient and neglectful of their duties, their allowances were withdrawn in 1806, and they continued their funtions as registrars of native marriages, for which they were remunerated by fees. The support of Government, and some pecuniary assistance, was subsequently given to the religious societies who established Christian schools in these districts. To the labours of these societies in the Cingalese and Malabar provinces the natives are principally indebted for the opportunities of instruction afforded to them since the decline of the Government schools.

It has been stated that the number of chidren nominally instructed in the public and private schools throughout the Island amounts to

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about 12,000 in a population of 900,000; and that the number of those who are taught the English does not exceed 800, while the numbers returned under the age of puberty are about 250,000.

It would facilitate the reform of the Government schools to place the establishment under the immediate direction of a commission, composed of the archdeacon and clergy of the Island, the agents of Government in the districts, and some of the principal civil and judicial functionaries at the seat of Government. It would be the duty of those resident in the districts to inspect and superintend the schools in their respective divisions, and to report on their efficiency and management. The schoolmasters should be appointed on the recommendation of the commission, and should in all instances be required to possess a competent knowledge of English to enable them to give instruction in that language.

If the national system of instruction should be introduced into the Government seminary at Colombo it would hereafter afford the means of providing competent teachers for the country schools; and in the meantime some respectable teachers might be selected from the retired clerks in the public offices which may be reduced, or from other descendants of Europeans who are candidates for such employment.

As the English missionary societies have formed extensive establishments in various parts of Ceylon, it would be unnecessary to retain the Government schools in situations where English instruction may already be afforded. The English missionaries have not very generally appreciated the importance of diffusing a knowledge of the English language through the medium of their schools, but I entertain no doubt that they will co-operate in this object.

There is a small English class in the central establishment of the Church Missionaries at Cotta, near Colombo, and a larger one in the principal seminary of the American missionaries at Batticotta, near Jaffnapatam. In both seminaries, but chiefly in the latter, the students have made some creditable proficiency in mathematics and in other branches of useful knowledge, affording the most satisfactory proofs of the capacity of the natives, and of their disposition to avail themselves of the opportunities of improvement afforded to them.

The American missionaries are fully impressed with the importance of rendering the English language the general medium of instruction, and of the inestimable value of this acquirement in itself to the people.

As the northern districts of the Island are chiefly indebted to these missionaries for the progress of education, the benefits of which are already experienced, it is but just to recommend that they should receive all the encouragement from the Government, to which their exertions and exemplary conduct have entitled them.

In aid of the object of establishing a college at Colombo, (an institution which is much desired by the principal native inhabitants throughout the Island), I would recommend that the buildings and grounds on "*Slave Island*," near Colombo, forming the late botanical establishment of the Dutch Government, should be appropriated to this object, and that an English professorship should be maintained by the Government. This institution, if it should be effectually supported by the inhabitants, would give great encouragement to the

elementary schools, and afford to native youths a means of qualifying themselves for different branches of the public service. 1831.

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For more detailed information on the subject of education in Ceylon, reference may be made to the replies given by the Colonial clergy and the English missionaries to the inquiries addressed to them, also to the communications of the American missionaries at Jaffnapatam, and further to the printed reports of the state of these institutions, which I visited in my progress through the Island.

The education afforded by the native priesthood in their temples and colleges scarcely merits any notice. In the interior, the Bhoodist priests have evinced some jealousy of the Christian missionaries; but the people in general are desirous of instruction, in whatever way afforded to them, and are especially anxious to acquire the English language.

In connection with the subject of education, it may not be unimportant that I should notice the great deficiency which at present exists in the means of diffusing information through the medium of the press.

Besides the Government printing establishment at Colombo, which is on a very limited and imperfect scale, there is a small press maintained by each of the English missionary societies for the publication of religious books and tracts in the English and native languages, although they are occasionally employed in the publication of general information. The very limited operation of these presses has tended to check the progress of moral and intellectual improvement; and in those parts of the country where there is but little intercourse with Europeans, the ignorance and prejudices of the people have been perpetuated, and have greatly tended to obstruct the improvement of the country and the amelioration of its institutions.

There is no existing law which prevents the establishment of printing-presses in Ceylon; but as the colonial Government possesses and has exercised the power of banishing persons from the Island, such a restriction must be considered virtually to exist.

In a political point of view, the unrestricted operation of the colonial press would have a direct tendency to promote good Government in the Island, and to diminish the influence of those classes who are interested in upholding the ignorant prejudices of the people, and who retain them in servile dependence on themselves.

The power of banishing individuals without trial is otherwise incompatible with the interests of the country in the encouragement which it is so desirable to hold out to the settlement of Europeans.

In recommending, therefore, that the Governor should not in future be allowed to exercise this power, except in cases where the tranquillity of the country might be endangered, I may be permitted to observe, that the relations and intercourse which would prevail between His Majesty's European and native subjects would constitute a more permanent bond of connexion with Great Britain than any which has hitherto subsisted in that remote dependency of the empire.

I have the honour to be, my Lord,

Your Lordship's most obedient servant,

W. M. G. COLEBROOKE.

Report of *Charles H. Cameron, Esq.*, one of His Majesty's Commissioners of Inquiry, upon the Judicial Establishments and Procedure in Ceylon; dated 31st January 1832.

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Special Objects of Judicial Establishments and Procedure in Ceylon.

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Special objects of Judicial Establishments and Procedure in Ceylon.

The condition of the native inhabitants of the Island of Ceylon imposes upon a Government which has their improvement at heart, the necessity not only of providing cheap and accessible judicatures for the relief of those who have suffered injury, and the punishment of those who have inflicted it, but also of guarding with peculiar anxiety against the danger that the judicatures themselves should be employed as the means of perpetrating that injustice which it is the object of their institution to prevent.

It is obvious that the importance of a good system of judicature increases in proportion to the deficiency of those other restraints upon the bad passions of mankind, which pass under the general name of morality, and in Ceylon these restraints are deficient to such a degree, that each individual owes nearly all the security he enjoys to the protection of the law.

But if the protection of the law is to be granted at all to the great mass of the native population, it must be granted gratuitously, that is to say, the expense, without which the intervention of judicial power cannot be obtained, must not be imposed upon any individual until it becomes apparent that he was not entitled to that intervention.

The smallest sums are of great importance to the natives of Ceylon, not only on account of their general poverty, but also on

account of the high value of money; so that fees and stamps, which from their small amount would seem to oppose scarcely any obstacle to the attainment of justice by the poor in England, must frequently operate as a complete denial of it in Ceylon.

At the same time, however, that the greatest facility must be afforded to every man who is really seeking redress, the utmost vigilance must be exerted to prevent legal proceedings from being perverted to purposes of vexation and oppression.

The disregard of an oath, and of truth in general among the natives is notorious; not less so is their readiness to gratify their malignant passion through the medium of vexatious litigation.

Before, therefore, any man is permitted to direct the process of a court of justice against another; before any man is permitted to cast upon another the burden of defending himself; before any party to a suit is permitted to cast upon his adversary any burden of proof, every possible means must be adopted to ascertain that he has probable grounds for doing so.

Those judicial establishments and that scheme of procedure, which I am about to recommend to your Lordship, have therefore two principal objects in view, and for the attainment of each of these objects two distinct sets of means seem to be essential.

The first object is—

I. To render it as easy as possible for any man to enforce his rights through the medium of a court of justice.

The two sets of means for its attainment are—

1st. The establishmen of a sufficient number of courts to which the suitor may apply with the least possible expense and delay.

2nd. Such a constitution of the courts as will insure, in the highest possible degree, correctness of decision.

II. To render it as difficult as possible for any man to inflict injury upon another through the medium of such courts as have been indicated above.

The two sets of means for its attainment are—

1st. A rigorous investigation into the truth of every allegation upon which a court of justice is required to lend its aid to a suitor.

2nd. The infliction of punishment upon every suitor who wilfully attempts to mislead the court.

Actual Judicial Establishments and Procedure.

Actual Judicial Establishments and Procedure.

Before I submit any recommendation to your Lordship, it will be proper to describe the judicial establishments and the forms of procedure now existing in Ceylon, so far at least as to enable you to judge of their defects with reference to what I have stated as the principal objects to be attained, and the means of attaining them.

For a more complete and detailed account, I take the liberty of referring your Lordship to the replies of the different judges to the questions which, for the most part, were addressed to them by my colleague, and to the printed laws of the Island.

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Judges of Original Jurisdiction; Number and Description of.

Judges of Original Jurisdiction, number and description of.

The judges having original and local jurisdiction are sufficiently numerous, or more than sufficiently numerous for all the purposes of justice.

There are in the maritime provinces seven (a) provincial judges and twenty sitting magistrates.

In the Kandyan provinces, one judicial commissioner, one sitting magistrate, one judicial agent, and ten agents of Government; and on this point the only alteration I shall have to propose is, that the distinctions between these functionaries should be abolished in name and substance, and their number more accurately adjusted to the quantity of business to be transacted.

Education of Judges of Original Jurisdiction.

Education of Judges of Original Jurisdiction.

All the above-mentioned functionaries are at present gentlemen not only unconnected with the profession of the law, but whose education has been in no degree adapted to the special purpose of qualifying them for the administration of justice, and who, by the usual course of promotion in the civil service, are practically acknowledged to be equally fit for the discharge of any other functions.

Pleadings and Evidence.

Pleading and Evidence.

The causes tried before the local judicatures all over the Island are not reduced, by any rational and methodical system of pleading, to one or more disputed points of fact or law.

The Court is generally obliged to give judgment without any previous separation of the matters really at issue, and the proofs applicable to them, from the confused mass of statement and evidence with which the passions and ignorance of the parties induce them to

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(a) Whoever is called upon to investigate the Legislation of Ceylon will escape some perplexity, by knowing that the Provincial Courts were formed by changes (very extensive changes certainly), wrought in the Dutch Landraads, or country courts.

The Provincial Courts and the Landraads are indeed treated as distinct institutions in the Charter of 1810, the 14th section of which abolishes the former, and re-establishes the latter; and also in the Charter of 1811, which repeals that section of the Charter of 1810. But in the 31st section of the Charter of 1801, the Landraad of Colombo is designated as the "Provincial Court, commonly called the Landraad of Colombo;" and I can find no legislative act of any kind professing to create the Provincial Courts de plano.

encumber the case; and as the judge does not sum up the evidence, nor give in general the reasons for his decision, all that the parties or the public, or even the judge himself, can know is, that he has given a decision in favour of *A.* and against *B.* But upon what state of facts the judgment has proceeded, or what points of law have been determined by it, can only be matter of vague conjecture.

This eivil pervades all classes of suits; but it is aggravated to the highest pitch in those suits arising in the maritime provinces, for the correct decision of which the legislature appears to have been most anxious to provide; viz. suits in which the value in dispute being above 15*l.*, an appeal lies to the minor, or to the High Court of Appeal. In such suits, the provincial judge is bound by law, provided a witness be competent, to receive and take down whatever he states, however irrelevant to the matter in dispute.

This was no doubt an expedient, but it is surely a very clumsy one, for insuring to an appellant party the benefit of any evidence which, in the opinion of the Court of appeal, might be relevant to the issue. It does not indeed attain this object, but at the same time it enables a party to waste the time of the Court below, and to embarrass the points for its decision to any extent.

The proper course is, undoubtedly, to leave the question of admission or rejection in the first instance to the Court of original jurisdiction, and to let its decision, upon that question itself, be brought before the appellate Court. This is what takes place in English procedure, by means of motions for a new trial and bills of exceptions.

Dependence of Judges on the Governor.

Dependence of Judges on the Governor.

The local judges are entire dependent upon the Governor's pleasure for their continuance in office. Not only can the Governor displace them without inquiry for alleged misconduct, but he can, without any harsh exercise of authority, and consequently without any responsibility to public opinion, remove them to some other department.

The mode, too, in which the provincial judges are to obtain legal advice in cases of doubt, is objectionable.

"The provincial judges are at liberty," says Mr. Justice Marshall, "whenever a point, not provided for by express regulation, presents itself, or a doubt arises as to the construction of the rules and regulations, or indeed in any other case of legal difficulty, to apply to the Advocate Fiscal, through the medium of Government, for instructions how they should proceed."

The relation thus subsisting between the local judges and the executive Government is incompatible with a proper degree of judicial independence; and one case came to our knowledge, in which a defendant who had, according to the practice, filed in a provincial Court a petition of appeal to the minor Court of appeal for the hearing of revenue cases, and who was desirous to amend his petition, as he was entitled to do, was informed, upon applying for that purpose to

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the provincial Court, that the whole proceedings had been sent to the Governor.

In the Kandyan provinces, the control of the executive Government over the local judges, is still more complete than in the maritime provinces.

Your Lordship will find, in the plan which I shall have the honour to recommend, that all interference with or control over the local judges in the exercise of their judicial functions, is transferred to the appellate jurisdiction.

The power of suspending any judge, however, until His Majesty's pleasure can be known, is left to the Governor.

Hitherto I have been describing to your Lordship, at the same time, the local Courts both of the maritime and of the Kandyan provinces; but in the details which follow, it will be necessary to treat of them separately. I shall take those of the maritime provinces first.

Maritime Provinces.

Assessors.

The provincial judges and sitting magistrates are not assisted by any jury or assessors. The audience who frequent their courts consists of natives, with whom the judge does not associate, and whose good opinion is of little or no importance to him. There is no Bar in his Court, there is no person present to whom, either officially or from motives of respect, he is called upon to sum up the evidence, and to state his view of the law applicable to the state of facts which the evidence establishes.

Setting aside, therefore, the apprehension of an appeal, of which I shall presently show the inefficacy, I may safely assert that every provincial judge or sitting magistrate who goes through the process necessary for arriving at a just conclusion upon the matters submitted to him, or indeed who bestows any painful attention upon them, does so from the sole motive of satisfying his own conscientious love of justice.

It was, I suppose, from a rational fear of the abuses which were likely to take place under such circumstances, that in the year 1816, a Regulation of Government was passed (No. 2, of that year), prohibiting provincial judges and sitting magistrates from trying and punishing perjury, prevarication or contempt, committed before themselves.

This remedy was certainly very ill chosen so far as regards contempts; the local judges were thereby deprived of a power essential to the efficient performance of the judicial function, instead of being subjected to such an effectual responsibility as would have controlled the abusive exercise of that power. The Regulation, No. 15 of 1820, recites in its preamble the evils to which this restriction gave rise, and restores the power which had thus been inadvertently taken away.

Stamps.

For every step which a suitor is permitted to take in these Courts, and the same is true of all the Courts in the Island, whether exercising original or appellate jurisdiction, except the Supreme Court

(*b*), he is obliged to pay, under the name of a stamp duty, a sum which, though it may be small and ineffectual for the beneficial purpose of raising a revenue, is large and powerful for the flagitious purpose of indiscriminately repressing litigation.

Suits *in forma pauperis.*

Rule and Order, 22nd March, 1824, p. 463.

An exemption, however, from the payment of these duties may be obtained upon petition to the Governor to sue *in forma pauperis*. Such "petitions shall be presented to the Court in which the suit is pending or to be instituted, or from which the appeal is made or to be made; and the property of the applicant must be proved to the Court by his own affidavit and the affidavit of two other persons;" and the Court is to "make inquiry and certify its opinion whether the applicant has apparently a good cause of action or defence."

On this subject a Minute of Government, dated 15th October 1816, is a very instructive document, because it shows how large a class of persons in Ceylon is in a condition to avail itself of this charitable privilege, and at the same time how insignificant an object this large class and its interests have appeared in the eyes of the colonial Government.

"The number of suits (says this Minute) admitted to be carried on *in forma pauperis* having become very great, and new applications being daily made, it has been deemed necessary that all depending petitions be transmitted to the Courts to which they relate, and that such others as may hereafter be presented will be referred in like manner, to remain in deposit till further orders."

"Provincial judges and magistrates are requested to establish amongst these claims such order of priority and succession as may appear just, reporting the same for his Excellency's information, and also stating when, and in what proportion, the general business of Court will admit, without public inconvenience, of entertaining more pauper suits."

The community being thus divided into those who can afford to pay for justice and those who cannot, the inconvenience of the former class, as distinguished from that of the latter, is openly designated as the public inconvenience; and the poor are plainly told that the Government will only distribute justice gratuitously at those seasons when the sale of it is slack. Those who cannot pay are plainly told that they have no right by law to the services of a Court of justice, but that, by sufferance, they may glean as much of them as is left after the true owners have taken all they have occasion for.

Application for delay.

No effectual means are adopted under the present system for ascertaining the truth of the grounds on which the parties make applications for delay. The ground of these applications is generally the alleged absence of witnesses; and to what an extent the practical evil resulting from this cause has been carried, will appear

(*b*) There are fees of Court payable by the suitors in the Supreme Court, which in general amount in the course of a suit to more than the stamps in the other Courts.

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from the following extracts taken from the evidence of those who are most competent to speak upon the subject, viz. the proctors who practise at Colombo. The experience of these gentlemen is in general confined to the Provincial Court of Colombo ; but on this point the preliminary observation of Mr. Henry Staples should be kept in view.

"I will now proceed to point out more fully the causes of this delay and the other defects that occur in its proceedings I speak, however, only of the Provincial Court of Colombo, which, with all its defects, is by far superior to those of the other provinces, its officers and practitioners having more opportunities to observe and compare their proceedings with those of the Supreme Court and correct what is imperfect, while the latter have especially the benefit of practising before the High Court of Appeal, and a greater field open to them for improvement in their possession. Having been in different parts of the Island, and having also had many opportunities of observing the proceedings of the other Provincial Courts in appealable cases, I have no doubt that considerably more reform is needed in those Courts than in that of Colombo."

Upon the subject of which I am treating, Mr. Henry Staples thus expresses himself :

"The next step is, by filing lists of the parties' witnesses, to which no other names can be added, as in respect of written evidence, the case being fixed for hearing is postponed successively from time to time for the attendance of absent witnesses, the parties never being called upon or obliged of themselves to produce them. I have known cases postponed in this manner from one to nearly three years. A plaintiff is thus at liberty to annoy a defendant for years together by keeping a suit pending over him, and a defendant can on the other hand prevent the plaintiff from recovering a just demand while squandering away his substance before his creditor's eyes; and this delay the defendant too often effects by giving in a long list of witnesses (most of whom are either fictitious, or the persons whose names appear, know nothing of the matter); and here let it be observed, that the provincial judges consider themselves obliged, by the 25th clause of the proclamation, that the ignorance of the judges would probably make them reject evidence which ought to have been received, though the clause does not seem to imply it.

"The practice of preventing the witnesses from attending or from subpœnas being served upon them, is often resorted to for the purpose of delaying the case. Some rules might be laid down to prevent these abuses: and the best that occur to me are, that a party should be obliged to produce his witnesses or show good grounds, on affidavit, why they are not forthcoming, and that they are so material to his case that he cannot safely proceed to trial without them."

Mr. Drieberg says. "I may say, that it is partly owing to this want of power in the provincial judge, that suits in the Court here are delayed. He is bound to hear all the witnesses that a party calls, particularly when it is appealable, unless waived, although in his mind a point has been sufficiently proved by the witnesses already examined. If one witness is absent in a case, and the party at whose instance he was subpœnead alleges that it is a material witness, the Court postpones the decision of the suit until he is examined, without making any inquiry as to what facts are to be proved by him."

The provincial judge of Jaffna remarks on the same subject: the proceedings certainly allow of being protracted by parties interested in such delay. The great cause of delay is, the non-attendance of witness on the day fixed for trial, and persons wishing to protract the proceedings will often purposely insert in the lists of their witnesses names of persons whom they know to be absent from the place, or induce the witnesses on their own or the opposite side to absent themselves. It is difficult, or indeed almost impossible, to discover and check this system of tricking, and cases are therefore often unnecessarily delayed by it.

Mr. Justice *Marshall*, in examining the plan of a Circuit Court for the trial of civil suits, says, "One rarely takes up the proceedings of any case from a Provincial Court, in which one postponement at least has not taken place (more commonly several) by desire of one or other of the parties, on account of the absence of material witnesses. This is a ground on which it is scarcely possible to resist the postponement of a trial, if it be true, and the truth of which it is not easy to ascertain. Let affidavits be required of the absence and even of the facts which would be proved by the absent witnesses, and this is going further than English practice would warrant; the necessary affidavits to any number and in any form which might be prescribed would never be w-nting."

It is clear that a judge may cause as much mischief by granting delay upon the allegation of grounds which have no existence in fact, as by indecision on matters of law, yet in the one case he does not feel himself under anything like the same degree of responsibility as in the other. As the appellate jurisdictions are now constituted, the granting or refusing of applications for delay never comes under their cognizance. But even if the judge had the strongest motive for doing upon such applications what justice requires, the existing practice does not afford him the means. Mr. Staples, in the above extract from his evidence, recommends that the party applying should show by affidavit why his witnesses are not forthcomming, and that he cannot safely proceed to trial without them; but such affidavits, as Mr. Justice Marshall remarks, would never be wanting; and the only effectual remedy for this great abuse is, to apply to the assertions of the party respecting the absence and the materiality of his witnesses, that test which is found to be the most powerful detector of falsehood in other cases, viz., *viva voce* examination and cross-examination; and this is accordingly what I shall recommend in its proper place.

Claims to property taken in execution.

Great difficulties appear to be thrown in the way of plaintiffs, even after the question between them and their adversaries has been determined, in consequence of fraudulent claims being set up to property taken in execution.

On this subject, Mr. H. Staples observes, "In no one instance is there so much delay experienced as in cases of execution, when a party, who, after a long lapse and considerable trouble has obtained a judgment, is unable to reap the fruits of it, by the opportunities which the practice of the Court, the Fiscal's regulation, and the defects of his department afford to a debtor, and to those who, from the nature of their office, are able to assist him in delaying to enforce the payment of his debt.

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"The regulation obliges the Fiscal to delay executing any writ against any property claimed by a third person, but he is to report every such claim to the Court from whence the writ issues. It does not authorize him to inquire whether the claim be well or ill-founded, the nature of it, or to require the production of any deeds or other evidence for the information of the Court.

"This part of the proceedings of the Provincial Court is attended with more mischief and abuse than any other. How often does it happen that a debtor causes some creature of his to enter a claim to property seized, without the latter having a shadow of title to it. The fiscal must of necessity report such claim, and the debtor thus gains his object of delaying the execution of the writ, on the return of which the claimant is cited to appear and establish his title to the property. Perhaps he does not attend to this notice; if this be the case, the writ re-issues with instructions to carry it into effect without attending to such claim; but another claimant appears, and the same course is pursued till the plaintiff is often tired out, and forced into any arrangement that his debtor, the defendant, may have proposed. But claims in execution, whether well or ill-founded, if proceeded in, seldom take less than a year for their decision; for though the regulation enjoins that they be heard summarily, yet by the practice of the Provincial Court, the whole proceedings are conducted in the same manner, and through all the stages as in an ordinary suit, and the same postponements take place for the same causes as in other cases, without any difference or exception whatever, and the same expenses are incurred. I have known such claims to have taken upwards of two years before they were decided, in short, the same length of time as in any other case."

The evil here described is certainly a very grievous one. I do not, however, perceive that there is anything in the nature of a claim made by a third person to property taken in execution, which renders it proper to be decided in a more summary manner than a claim to property under any other circumstances. But the process of bringing the claimant before the Court by a citation is unnecessarily circuitous. The claimant, giving notice to the Fiscal to hold his hand, should come at once before the Court like any other plaintiff, and then, like him, he will undergo, if my views should meet your Lordship's approbation, such an examination as is best calculated to bring to light the real nature of his claim, and such punishment, should its falsehood be established, as is best calculated to prevent a repetition of such attempts.

The process of the local Courts appears to be executed in a very negligent manner. The evidence we possess on this subject also is derived from the proctors resident at Colombo, and it shows that there are two causes of negligence in executing the process of the local Courts. First, that the Fiscal, who is the executive officer of all Courts in the maritime provinces, receives no rumuneration for executing the process of the local Courts; and secondly, that he is not practically liable to be punished by them for neglect of duty; I say practically, for though the law on the subject seems to be generally considered doubtful, I entirely agree with the opinion expressed in the evidence of Mr. Hillebrand, that

Negligent in Execution of Process.

every person is subject to the Court of which he is an officer, in respect to his office.

Mr. Drieberg says, "The Court has likewise no power to punish the Fiscal, or the headmen acting under him. for their negligence in executing process, which is the main cause in consequence whereof witnesses cannot be easily brought before the Court, and again the difficulty to bring before the Court the server of the subpœna upon an absent witness who is to verify the service on oath before an attachment can be issued."

Mr. Martensz says, "The Fiscal, though personally responsible for the acts of his deputies, takes no part in the execution of the process of the Provincial Court, and indeed interferes very little with the execution of the process of that Court, because he derives no sort of fee or emolument, while upon the writs of the Supreme Court he receives a fee of 5 per cent. up to 500 Rixdollars, and above that sum, 3 per cent. on the amount of the writs, besides other fees for serving every citation and order of that Court; and I should therefore think that if some remuneration were allowed to him, or rather to the person who carries the writ into execution, as also for serving every other process of the Provincial Court, he might be stimulated to more activity in the execution of the process of that Court likewise. It is a doubtful question whether the Fiscal is liable to punishment by attachment or otherwise by the Provincial Court, for remissness in the execution of its process; and I should think that if this power were to be expressly given to that Court, it will have another beneficial effect in the enforcement of its process, as the Fiscal will then know that punctuality is the only means of eluding the punishment which will otherwise fall upon him."

Mr. Hillebrand says, "But the reverse is the case with the process issued from the Provincial Court of Colombo, which is an additional cause of the delay of cases in that Court, which very often waits in vain for the attendace of the several defendants and witnesses on the day and at the hour appointed for their appearance, owing to the non-service of the process on them in due time, if at all. This delay and irregularity is of more frequency, and very glaring, in respect to the process of execution, which is very seldom or never returned to the Court on the day it is returnable, much less is the money, which is commanded, to be levied by this process, regularly and punctually recovered and returned to the Court, but on the contrary, it is delayed for many months, nay, even for years together, without carrying it into full execution.

"The reason of this striking difference, I think to be, first, because the Fiscal receives certain fees to execute the process of the Supreme Court, and none for that of the Provincial Court, and therefore in one case he is active and diligent, and in the other remiss and indolent; and secondly, because he is aware that the Supreme Court is vested with the power of visiting him with fine and imprisonment for any neglect of his duty; and on the contrary, it is supposed by him, and by many others, that the Provincial Court has no such power vested in it, contrary, I humbly believe, to all principles of law, at least contrary to the Civil or Roman Dutch laws, according to which every person is subject to the Court of which he is an officer, in respect to his office, although he be not subject to the jurisdiction

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of such Court by virtue of any right or privilege he may be entitled to; but the reason generally assigned by the Fiscal when he is called upon to answer for the neglect of his duty is, that he has no control over the headmen, and therefore unable to force them to execute his orders; and although this plausible excuse may, in some degree, hold good with respect to the process that is to be executed by the headmen in the corles, still it is no answer or justification with regard to process, that is to be executed within the gravets, and respecting which he has very seldom, if ever, given a satisfactory answer, whenever he has been called upon to account for its delay; and yet he has never been visited by the Court by any sort of duresse or amercement for the reason above stated."

These extracts will show your Lordship that, even if the decrees of the local judicatures were the result of the profoundest legal knowledge and the most diligent investigation, and if they could be obtained with the least possible delay and expense, the suitors would be still very far from deriving from them that protection which is the greatest blessing of good Government.

Defects in Jurisdiction.

The principal defect in the civil jurisdiction allotted to the local Courts, consists in the almost complete exemption of Europeans from it, and in the nature of the exception to the completeness of that exemption.

No provincial judge can try any cause in which a European is defendant, in which the value in dispute exceeds 7*l.* 10*s.*, though he can try causes between natives to any amount. My anxiety for the improvement of the natives of India does not render me blind to the marked distinctions which exist between them in their present moral condition and their European governors; and I think it highly important that such distinctions should not be neglected in constructing institutions for our eastern possessions.

I would not, for example, trust a native with power over his countrymen in any case in which pecuniary considerations do not prevent the employment of a European. Their general contempt for the rights of inferiors, and the abominable spirit of caste, render them very unsafe depositaries of such a trust. But all men are equally entitled to protection from those who undertake to govern them; to protection from each other, as well as from external enemies; the lower too the moral condition of the people, the more do they need such protection; the more too is their Government concerned, both in interest and duty, to afford it to them.

It must be remembered, that in Ceylon the Provincial Courts administered the same laws as the Supreme Court, so that there is not the same reason for this distinction between Europeans and natives as in Continental India; and the distinction does not here, as there, merely separate the causes of Europeans from those of natives, but it places on one side those causes of Europeans in which the value in dispute exceeds 7*l.* 10*s.*, and on the other, those causes of Europeans in which the value in dispute falls short of 7*l.* 10*s.*, together with all the causes of natives, and leads therefore to the inevitable inference, that these last are of no more account in the eyes of the Government than those trifling interests of Europeans (as they are generally though improperly considered) with which they are thus classed.

The truth is, that the administration of justice to natives is of far more importance than its administration to Europeans, because they are so much less disposed to do justice to each other voluntarily; and I know of no instrument so powerful for gradually inducing upon them habits of honesty and sincerity as a judicial establishment, by which fraud and falsehood may be exposed to the greatest possible risk of detection and punishment.

The civil jurisdiction of the Sitting Magistrates has the same limits with regard to Europeans, as that of the Provincial Judges, with the exception of the Sitting Magistrates of Mulletivoe, Trincomalee and Batticaloa, who can try civil causes in which a European is defendant, provided the value in dispute does not exceed 22*l.* 10*s.*

Testamentary Jurisdiction.

The Provincial Courts have a testamentary jurisdiction (which is apparently considered to include the power of appointing guardians to minors) which they have exercised *de facto* since the year 1805.

The Regulation No. 5, of 1826, legalizes the past exercise of this jurisdiction, and provides for the future exercise of it by the Provincial Courts.

This part of the business of the Court appears to be conducted in a peculiarly negligent and unsatisfactory manner.

On this subject the evidence of Mr. Jumeaux, who practises as a proctor both in the Supreme Court and in the Provincial Court of Colombo, is very important.

"Should the Provincial Court of Colombo continue, I am of opinion that its testamentary and matrimonial jurisdiction, and the cases in them now pending, should be transferred to the Supreme Court without delay, for the evils in this class of cases are incalculable in the Provincial Court of Colombo; I dare say it is worse in the out-stations, owing to the distance they are from the Supreme Court. In the Supreme Court, one of the principal duties of the master in equity is to audit and check the accounts of the administrators and executors immediately under its control, by which means the interests of minors and others are protected, whilst in the Provincial Court of Colombo, executors and administrators have uncontrolled management of the property of minors and absentees.

"The testamentary business of the Court is shamefully conducted for want of a sufficient establishment to attend to it, as well as to the great press of other business that daily engages attention.

"No official administrator has ever been appointed to administer to intestate estates, and the proceedings of the Court in its testamentary jurisdiction are loose and improperly conducted, and the provincial judge is really incapable of remedying the defects that exist in these particulars. It is the opinion of every one that the testamentary business throughout the Island ought to be thrown into the Supreme Court, where every attention is paid to it, and every remedy known and given to the persons interested."

Issabella Perera's Case.

A case came to my knowledge in consequence of a petition presented to Colonel Colebrooke and myself, which confirms the view taken on this subject by Messrs Jumeaux and Henry Staples; and it illustrates in so striking a way how shamefully the interests of

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minors are neglected under the present system and how great the necessity is for some reform in that system, that I think it right to bring it very concisely under your Lordship's notice.

The petition presented to Colonel Colebrooke and myself, stated facts which seemed to us to call for some inquiry on our part, as being illustrative, if true, of the mode of proceeding in the Provincial Courts. We did accordingly inquire, and the following appeared to be the facts of the case :—

Hettiage Isabella Perera, a minor, who presented the petition, was the daughter of Hettiage Justina Perera. Upon the death of the latter, administration was granted by the Provincial Court of Colombo, and on the 22nd June 1819, the sum of 759 r-ds. 7f. was paid into that Court by the administrator, as the share of the minor. The sum was deposited in the Cutcherry of Colombo, and out of it a sum of 750 r-ds. was lent on interest, to one A. P. Dirksz, on the 28th July, 1819. In May 1820, a sum of 50 r-ds. 7f. 2p., arising from interest on the sum so lent out, was paid to one Garetooregey Gabriel Perera, for the maintenance of the minor. On the 22nd November 1820, A. P. Dirksz, paid into Court the sum borrowed, 750 r-ds., and 38 r-ds 3f. for further interest, both which sums were deposited in the Cutcherry of Colombo, and which making together, with the balance of 9 r-ds. 7f. then in deposit, a total of 797 r-ds. 10f. remained unproductive in the Cutcherry until the 24th September 1830 and where it might have remained unproductive until the minor attained her full age, as it seems to be no part of the duty of the judge, or of any officer of his Court, to look after the interests of minors.

Some time previous to the 6th April 1830, the minor presented a petition to the Governor, stating that she was in a destitute condition, and praying that the money to which she was entitled might be made available for her support.

The petition was referred by the Governor to the provincial judge of Colombo, who reported that the Court had offered the sum in question "to the petitioner, or any other person on her behalf, to take, on giving sufficient security, for the benefit of the minor."

On the 24th September 1830, the money was paid to Henry Augustus Marshall, Esq., who, at the request of the minor, had been appointed her guardian, on his giving the requisite security.

At the rate of interest which may be obtained in Ceylon, the fortune of this girl (for such a sum is really a considerable fortune to a native girl) would have been more than doubled, had it been the duty of any responsible person to see that it was properly employed.

The Courts of the Sitting Magistrates have only criminal jurisdiction, and that sort of civil jurisdiction which is usually called ordinary civil jurisdiction ; but the Provincial Courts have I believe, every species of jurisdiction ; it is said, indeed, that they have no equitable jurisdiction, but such an expression, when used in reference to a country in which the Dutch Roman law prevails, has a meaning very different from that which it commonly conveys to the minds of those bred in a country like England, where a very large portion of rights is removed from the cognizance of courts of law.

All that the expression means, when applied to the Provincial Courts in Ceylon, is, I believe, that they cannot grant the two sorts of relief known to the Dutch Roman law, "Restitutio in integrum,"

and "Judicial Relief;" that is to say, that they cannot relieve a party against such of his own acts as he, being legally competent to perform, has been induced to perform through fear, fraud, error, &c., nor can they relax the general rules laid down for regulating their own proceedings, upon the ground that such rules are productive of injustice in the particular case.

These are powers both incident to Courts of law in England, though the latter is called their equitable jurisdiction, and which every Court is fit to be entrusted with which is fit for the administration of justice at all.

Appellate Jurisdictions.

The proceedings of the local judges are very insufficiently controlled by appellate judicatures.

Minor Courts of Appeal.

There are four minor Courts of appeal, one at Colombo, one at Jaffna, one at Trincomalee, and one at Galle.

Their constitution is still more defective than that of the Courts of original jurisdiction. The judges who preside in them, like those whose decisions they are appointed to correct, have no education adapted to their functions; they sit without jury or assessors, and their proceedings attract less attention than those of the Courts of original jurisdiction. The minor Court of Appeal at Colombo may be taken as an example. The judges who sit in it are four in number, so that their responsibility would be quartered, were it not so small as to be practically indivisible. They are, the provincial judge, the sitting magistrate (two of the functionaries from whom the appeal lies), the commissioner of revenue, and the collector of customs, all persons whose time ought to be fully occupied with other duties.

The Regulation of Government, No. 5 of 1809, by which the minor Courts of Appeal were established, provides that they shall be competent to receive appeals from the decisions of all the provincial and other inferior Courts within their respective jurisdictions in all civil cases whatever, under the amount appealable to the High Court of Appeal, that is to say, under 30*l*.

If the constitution of the minor Courts of Appeal had been such as to insure in any degree correctness of decision, the absence of all limitation downwards of the right of appealing to them would have been highly commendable; for it is unquestionable in those causes which are usually called trifling, in those causes the correct decision of which is of most importance to the happiness of the people, that every motive *ab extra* which can stimulate the attention of the judge, and impress him with a sense of responsibility, should be brought to bear upon him.

Those who have legislated for Ceylon, however, have been of a different opinion. By Regulation No. 9, of 1814, the appeal from the Provincial Courts is taken away, when the value in dispute does not exceed 15*l*., and the appeal from any other Courts of inferior jurisdiction is taken away, when the value in dispute does not exceed 1*l*. 17*s*. 6*d*., excepting in cases "wherein the title to or possession of landed property shall directly or indirectly be in question."

The preamble of this latter Regulation is remarkable; and as my opinions are altogether wrong, if the doctrine assumed by it be right, I shall offer a few remarks upon it.

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The preamble recites, that "it is found by experience that the right of appealing to the minor Courts of Appeal in cases of trifling value, serves only to encourage petty litigation."

That experience should show this, cannot indeed be matter of surprise to any one; but experience has never shown that all petty litigation is an evil, or that petty injustice, which is a most grievous evil, can be prevented or remedied by any other means. A suit for a sum under 1*l.* 17*s.* 6*d.* may indeed seem an object of contempt to an European judge. Considering any individual case by itself, he would probably rather pay the amount claimed than be at the trouble of examining and deciding the question between the parties: but in the eyes of a native of Ceylon of the lower class, such a sum appears, and with great reason, an object of very high importance, an object, the unjust detention of which is calculated to excite in his mind the most violent animosity against the person who commits the wrong, and the Government which fails to redress it.

Among all the duties incumbent on the British rulers in the East, it is impossible to name one more imperative than that of providing for the effectual decision by public authority of the disputes arising among the poorer classes, in other words, of providing for those classes the means of carrying on that petty litigation which this preamble so contemptuously stigmatizes. There is no benefit which a European Government can confer upon its Asiatic subjects of the poorer class so valuable, and no means by which it can secure the permanence of its own dominion so honourably and effectually as this, and it is a benefit which none but an European Government can confer. There is no way in which such part of the public property as the Government might think fit to devote to eleemosynary purposes, can be so beneficially employed as in paying judicial establishments, by which the poor may obtain really gratuitous justice.

The misery and resentment of a poor man suffering under an act of injustice are most cruelly aggravated by the contempt with which the legislative and the judicial powers thus openly treat his misfortunes, and I can conceive no tie which will bind the lower people so strongly to their Government, as a judicial establishment so contrived as that the very same attention and discrimination should be employed upon their causes as upon those of their affluent neighbours.

Your Lordship will find accordingly that the sort of appeal which I shall recommend will be extended to all cases, without reference to the value of the object in dispute.

High Court of Appeal.

The High Court of Appeal is better constituted than the minor Courts of Appeal, so far as regards competency for the decision of legal questions, inasmuch as the two judges of the Supreme Court are members of it. The other members are the Governor, the chief secretary, and the commissioner of revenue, who, as far as regards any legitimate purposes of judicature, are superfluous, and whose time ought to be occupied with other duties.

This Court is furnished by the 92nd section of the Charter of 1801, with very ample powers for correcting the mistakes and abuses of the subordinate jurisdictions; but as it sits always at Colombo, its judgments must in general be founded upon such matters only as appear upon the records transmitted from the Courts in which the

suits have been originally decided, as the distance of most of these Courts from Colombo must make the bringing of witnesses thither an operation so difficult and expensive as to be beyond the means of ordinary suitors.

When, therefore, I consider the general ignorance and poverty of the native suitors, and the general ignorance and dishonesty of their native legal advisers, together with the servility of both towards the Europeans in authority over them, it seems to me that the only mode of combining that unity which is every where essential to an appellate jurisdiction, considered as the ultimate expounder of the law, with that ubiquity which in Ceylon it must possess in order to be effectually accessible to the native suitors, and effectually to control the local judicatures, is to send one Appeal Court on circuit through the whole Island to hear and determine appeals in causes of all kinds; and this is accordingly the measure which your Lordship will find recommended in its proper place.

By the 88th section of the Charter of 1801, the High Court of Appeal is declared to be "a Court of civil jurisdiction for the hearing and determining appeals from all or any of the Courts of justice established or which may be established within the said settlements and territories in the Island of Ceylon, with their dependencies," except the Supreme Court. These words seem to hold out a promise of something like an uniform system of appellate jurisdiction. But, as by the 90th "section of the same Charter, the sum or value appealed for must exceed 30*l.*; and as the sitting magistrates, who try the far greater number of civil causes, are not competent to try causes of that description, the benefit of this appeal is in fact confined to a small portion of the suitors in the Provincial Courts.

The returns which we possess do not enable me to ascertain accurately what the proportion is between the causes which may be carried up to the High Court of Appeal and those which cannot, that is to say, between the causes in which the value in dispute exceeds 30*l.*, and the causes in which it does not exceed that sum. But these returns exhibit for the years 1826, 1827, 1828, and half of 1829, the proportion between the causes in which the value in dispute exceeds 22*l.* 10*s.*, and the causes in which it does not exceed that sum, from which an approximative judgment may be formed of the proportion between the cause which are appealable to the High Court, and the causes which are not. Taking the average of the three years and a half above mentioned, I find that the number of civil causes tried annually in the maritime provinces (I omit the few causes tried by the Supreme Court, which belong to an entirely different system of judicature), in which the value in dispute exceeds 22*l.* 10*s.*, is 683; while the number in which the value in dispute falls short of that sum, is 14,107, giving a proportion of not quite one to twenty. So that, even if the amount which renders a cause appealable were reduced to three-fourths of what it actually is, more than 19 out of 20 suitors would be excluded from the benefit of access to this, the only appellate jurisdiction deserving of the name.

The supervision of a competent public, and that of a competent appellate jurisdiction, are, I believe, the only means by which Courts of original jurisdiction are rendered in any country fitting instruments

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of judicature. Your Lordship will not therefore suppose that I mean to cast any reflection upon the gentlemen who preside in the local Courts of Ceylon, when I say, that it is contrary to all our experience of human nature that they should be able to find in the recess of their own minds a sufficient motive for the exertion of that unremitting attention which is necessary for the investigation and decision of the matters which come before them, and of that imperturable patience which can alone control the movements of indignation which the importunity, folly, impertinence and knavery of Indian suitors and Indian witnesses are calculated to excite.

In criminal cases there is no appeal from the Courts of original jurisdiction; but the Supreme Court (which is itself a Court of original jurisdiction, and, as such, will be presently described), exercises over these Courts in criminal matters as much of superintendence as can be exercised by virtue of mandates in the nature of writs of mandamus, certiorari, procedendo and error.

Very soon after my arrival in Ceylon I had the honour to make a Report to your Lordship's predecessor, in conjunction with Colonel Colebrooke, on the dangerous uncertainty in which the right of the Supreme Court to issue writs of habeas corpus was involved, and on the encroachment which had been made on that right, supposing it legally vested in the Court, by a Regulation of Government, passed *ex post facto* by a former Lieutenant-Governor, which Regulation, notwithstanding the express orders of Lord Bathurst for its appeal, was still in force when I arrived in the Island.

In consequence of that Report, Sir George Murray was pleased to recommend to His Majesty to pass an Order in Council, which has established the power of the Court to issue the mandate.

In the proper place, I shall recommend the union in one Court of all those functions by which the proceedings of original judicatures of all sorts are superintended and controlled.

Supreme Court.

Among the Courts having local jurisdiction must be reckoned the Supreme Court, though it has also, in respect of certain classes, jurisdiction over all the dominions which His Majesty had in Ceylon at the time of its establishment, that is to say, over all the maritime provinces, and its criminal jurisdiction and Fiscal jurisdiction extend to all persons in those provinces.

In respect of its dignity, of the qualifications of its judges and the expense of its establishment, the Supreme Court ought to hold the first place among Courts of local and original jurisdiction; but in respect that it transacts only a very trifling portion of the business, even in that narrow district to which its local jurisdiction is confined, and in respect that it is rather an excrescence upon the general system of judicature than a regular part of it, I have chosen to describe it last.

Its local jurisdiction extends no farther than the town, fort, and district of Colombo (*c*), and consists of a civil, equitable and testamentary jurisdiction, and a jurisdiction over infants and lunatics.

(*c*) The expression "district of Colombo" has a much more limited signification when used with relation to the Supreme Court, than it has when used with relation to the Provincial Court of Colombo.

But all these jurisdictions extend as regards Europeans and persons registered in the secretary's office as licensed to reside, over the whole of the maritime provinces.

There are words also in the Charter which provide for their eventual extension, together with that of its criminal and matrimonial jurisdiction, still further ; but those words have been held by the law officers of the Crown in England not to apply to the Kandyan provinces until they shall be annexed as dependencies to the maritlme provinces. The extension of the jurisdiction of Supreme Court to Europeans, and the denial of it to natives beyond the limits of the town, fort and district of Colombo, is an unfair and invidious advantage given to the former over the latter, for the judges of this Court, two in number, are gentlemen regularly educated to their profession and devoting their lives to it, and there is not in Ceylon the same ground for this distinction between Europeans and natives as in Continental India.

There the English law is administered to Europeans, and the native laws to natives ; but in the maritime provinces of Ceylon the Dutch Roman law is administered, with certain exceptions, to Europeans and natives indifferently.

This provision was intended no doubt to confer an advantage upon Europeans in respect to equitable jurisdiction, as well as in respect to the other jurisdictions enumerated ; but in reality it imposes a disadvantage upon them as opposed to natives in that respect, for as no other Court in the Island has any equitable jurisdiction, a European has no remedy in equity against a native not residing at Colombo, but all natives have a remedy in equity against all Europeans.

Now, though in a very large sense it may be said that it is an advantage to a man that he should be compellable in all cases to act justly, it is certainly not that sort of advantage which Europeans have generally reserved as their own peculiar privilege in their Eastern dominions ; and, in every point of view, the want of a reciprocal power to sue a native in equity is a disadvantage to the European. What I have just said may seem inconsistent with the remarks I made upon the meaning of the expression, "Equitable Jurisdiction," in speaking of the Provincial Courts, but as the Supreme Court is empowered by the Charter to exercise an equitable jurisdiction in point of form as nearly as may be according to the rules and proceedings of the High Court of Chancery in Great Britain, it has thus been enabled to escape from that absurd rule of evidence by which, according to the Dutch Roman Law, the oath of the party is held decisive of the matter sworn to.

This is certainly a considerable advantage, but though, as far as I have been able to discover, it is the only one which results from the equitable jurisdiction conferred on the Supreme Court by he Charter it does seem from the wording of that instrument that it was contemplated by the framers of it.

The only jurisdiction of the Supreme Court remaining to be noticed is its matrimonial jurisdiction.

This is conferred by the 52nd section of the Charter together with the testamentary jurisdiction, and with the same limitations ; but the 54th section provides, that it shall not extend to natives, and as it is only as regards natives that it had any local limits by the 52nd section, it

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is not, or at least was not at the time the Court was established, in any respect a local jurisdiction.

The criminal jurisdiction of the Supreme Court is exercised on circuit, and at Colombo; and the trial by jury, as your Lordship is aware, was introduced at the suggestion of Sir Alexander Johnston by the Charter of 1810. I attended nearly all the trials by jury which took place while I was in the Island, and the impression on my mind is, that an institution in the nature of a jury is the best school in which the minds of the natives can be disciplined for the discharge of public duties The juror performs his functions under the eye of an European judge, and of the European and Indian public, and in circumstances which almost excluded the possibility of bribery or intimidation.

In such a situation he has very little motive to do wrong, and he yet feels and learns to appreciate the consciousness of rectitude. The importance which he justly attaches to the office renders it agreeable to him; and he not only pays great attention to the proceedings, but for the most part takes an active part in them.

No prisoner can be tried before the Supreme Court, but upon the prosecution of the Advocate-Fiscal, who therefore resembles rather the Lord Advocate of Scotland than the Attorney-general of England; his place is supplied in case of necessity by the deputy Advocate-Fiscal, who is also master in equity. Both these officers are English barristers.

Those prisoners who are tried before the Supreme Court are entitled to the assistance of a proctor, paid by the Government; a provision deserving of the highest commendation, and well calculated to make the Government beloved and respected by its subjects.

The witnesses on both sides, in criminal cases before the Supreme Court, are also paid by Govenment (*d*). "By a circular letter (says Mr. Justice Marshall), from the Chief Secretary of Government, dated 20th November 1823, all magistrates are moreover to ask every prisoner, at the time of committing him, if he has any witnesses; to indorse their names, if any, on the commitment; and to intimate to such prisoners that Government will only allow batta (money for their subsistence during their attendance) to those witnesses whose names shall be given at that time. This limitation as to batta, which the great number of useless witnesses, almost always summoned by native prisoners, rendered very necessary (*e*), by no means precludes their rights to summon as many as, on subsequent consideration, they may think advisable; accordingly, at a convenient time before the session, all the witnesses on both sides are subpœaned by the Fiscal, and if any of them fail to attend without sufficient excuse, a warrant of attachment issues against them. All witnesses, on the one side as well as on the other, except such as live within the four gravets of the

(*d*) The Chief Justice in his evidence speaks of this payment as being made in the southern districts only. I have conversed with that gentleman on the subject since my return to England, and he states, that in practice the witnesses of prisoners in the northern district do not receive "batta," though he is not aware that this distinction has any foundation in law.

(*e*) *Note* by Mr. Justice Marshall.—It is no uncommon thing for a prisoner to summon upwards of 100 witnesses, all perhaps ignorant of the matter.

place where the session is held, and except those of the prisoner as above mentioned, whose names are not given at the time of his commitment, are allowed batta by Government from the day on which they leave their houses till the day of their discharge, and a reasonable time afterwards to allow of their return.

"This is paid by the Fiscals of the several districts, abstracts being made of the witnesses and the sums paid to them respectively, which abstracts are signed by the witnesses, and serve as vouchers for the Fiscals, for their repayment by Government. The amount varies according to the rank of the witness, the lowest sum being six pice (or 2 and ¼ pence), the highest, one Rixdollar (or 1*s.* 6*d.*) per diem. Witnesses of the rank of mohandiram, or above it, are allowed travelling expenses for palanquin-bearers, boat-hire or bullock carts, according to their degree or the mode of travelling which may be necessary."

This right of the prisoner to have the expenses of his witnesses paid appears to me to be, in some respects, too much restricted, and in other respects too little restricted.

Considering the interests of the witness, it seems to me that his claim to compensation has nothing to do with the propriety or impropriety of summoning him, and consequently, that the expenses of every witness who is summoned, and who attends *bona fide*, should be paid.

It follows that the restriction on the prisoner's right should not be in respect of the payment, but in respect of the summoning of his witnesses.

The prisoner should be compelled to lay before the magistrate reasonable grounds for summoning the witnesses he names. It surely does not follow, because a man has been accused of a crime, that he should be permitted to call away from their homes and their occupations a crowd of persons who know nothing about the matter in question, either at their own expense, or at that of the public. But on the other hand, a prisoner ought not to be deprived of the full benefit of a witness's testimony (and the full benefit of testimony cannot, in general, be had from a witness who knows that his expenses are not to be paid), because in the agitation which may come upon any man when he is taken before a magistrate on a criminal accusation, he omits to specify that witness.

I shall have to consider the question, as to the payment of the expenses of witnesses by the public more fully and more generally than is necessary in this place, when I come to lay my recommendations before your Lordship.

No appeal lies from the Supreme Court to the High Court of appeal; but the judges of the Supreme Court are, *virtute officii*, judges of the High Court of appeal.

The only appeal from the Supreme Court is to the King in Council; and it is confined to cases in which the value of the matter in dispute exceeds 500*l.*

The following statement will enable your Lordship to compare the quantity of business done by the two judges of the Supreme Court (which is all that the existing regulations permit it to transact), with the quantity done by the two other judges resident at Colombo; namely, the Provincial Judge and the Sitting Magistrate.

1832.

Cameron's Report.

Total number of Civil and Criminal cases tried in the three years, 1826-27-28 :

Provincial Courts and Magistrates' Court at Colombo...... 18,145

Supreme Court at Colombo and on the circuits................ 529.

I doubt whether such a waste of judicial power is exhibited in any other country in the world. Here are two judges sent from the English or Irish bar, invested with high rank, and remunerated by ample salaries, for the purpose of trying (*f*) 176 causes, Civil and Criminal, in the course of a year, as judges of the Supreme Court, and 38 appeals in the same period, as judges of the High Court of appeal.

An extension of the jurisdiction of the Supreme Court has, I believe, been recommended by every judge that has ever sat in it; and if there were really any valid objection to such a measure, it would follow that the Court ought to be abolished, or very greatly reduced. In the plan which I shall have the honor to recommend your Lordship, I believe that ample occupation is provided for it.

Kandyan Provinces.

The local judicatures in the Kandyan Provinces do not differ in many essential particulars from those of the Maritime Provinces; they differ however in some, and they contain the rudiments of one institution, which, if improved and extended over the whole Island, will, I think, produce the happiest effects.

The local judicatures consist of the judicial commissioner's Court at Kandy, which is also a Court of appeal; the Sitting Magistrate's Court at Kandy; and the Courts of the superior and inferior "agents of Government" in the provinces.

Assessors.

The judicial commissioner and the agents of Government must be assisted by at least two Kandyan assessors in all civil cases wherein land is the object in dispute, or wherein the value of the object in dispute exceeds 100 rix-dollars; and in all Criminal cases, except those of "inferior description, such as common assaults, petty thefts, and breaches of the peace."

The presence of native assessors, who take an authoritative part in the proceedings, and thus constitute a legitimate organ for the tranquil and effectual expression of public opinion in judicial matters, is the institution from the extension and improvement of which I venture to anticipate so much advantage.

The present assessors are selected from too small a class, and not from that class which is best adapted to the purpose.

In Kandy they are, by the 37th section of the proclamation of 21st November 1818, "two or more chiefs, and in the provinces one

(*f*) This is about the number usually tried at the York assizes by one judge in the course of a fortnight, but in instituting this comparison, it is proper to bear in mind, that the judge at York is occupied during the fortnight solely in the trial of causes, whereas the two judges of Colombo are occupied during the year, not only with the trials, but with the proceedings previous and subsequent to the trials.

or more dessaves of the province, and one or more mohottales or principal korals, so as there shall be at least two Kandyan assessors, or two mohottales or korals where no dessave can attend." 1832. Cameron's Report.

The persons here described are official persons of high rank, who cannot be regarded as fair representatives of the community; and they are so few in number, that the burthen of attendance would fall upon them with unreasonable severity, if they were called upon to assist, as I think for the interests of justice they ought to be, at the trial of all cases.

They are more in the nature of judges than jurors, or rather they unite the defects of both. They unite that official permanence, which renders a judge unfit to decide many sorts of questions without the check imposed by the presence of some recognized representatives of the public at large, together with that want of professional skill which makes a juror unfit to decide any question without the assistance and control of some more disciplined mind.

A great man in the Kandyan country, and I suppose in all semi-barbarous countries, is peculiarly unfit for any occupation which demands laborious attention or laborious preparation. It appears from Robert Knox's very curious and accurate account of the Kandyan country, that in his time (that is, in the latter part of the 17th century) it was the business of the inferior officers to instruct their superiors in the manner of performing their duties.

After describing the adigars, he adds, "To these there are many officers and serjeants belonging.

"If the adigar be ignorant in what belongs to his place and office, these men do instruct him what and how to do: the like is in all other places which the King bestows; if they know not what belongs to their places, there are inferior officers under them, that do teach and direct them how to act."

Sir John Doyley also, in his *Sketch of the Constitution of the Kandyan Kingdom*, remarks, that "the chief officers being principally chosen from the noble families, it frequently happened that they were persons of inactivity and inability, and being inexperienced in the affairs of the province or department committed to their charge, were frequently guided, in judicial as well as other matters, by the provincial headman, or by those of their household."

From several conversations I had with different chiefs at Kandy, it appears to me that this ignorance was rather put forward by them as a matter of boast, and that they considered the removal of it by study and reflection as a drudgery very unworthy of their condition.

I shall therefore recommend to your Lordship, that the assessors should be chosen from all the respectable classes indiscriminately.

When the majority of the assessors differ from the agent of Government, the proceedings are transferred to the Court of the Judicial Commissioner, instead of the cause being decided by the inferior Court, subject to an appeal to the superior, at the option of the losing party. In like manner, when the majority of the assessors differ from the Judicial Commissioner, the proceedings are transferred to the Collective Board (the first commissioner, the judicial commissioner, and revenue commissioner), who report upon the case to the Governor, who decides.

I think that in all cases the losing party should have every facility

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Cameron's Report.

for appealing from the decision of the tribunals having original jurisdiction, and that a difference of opinion between the judge and the assessors may form a very reasonable motive in the mind of the party for such a proceeding; but I cannot see the expediency of forcing a cause, by the mere operation of law, into the superior Court, when the losing party might possibly be convinced that the reasons on which the opinion against him is founded, are really those which ought to determine the question.

Stamps.

As in the Courts of the maritime provinces, so in the Kandyan Courts, the suitors cannot take a single step without paying for a stamp, and this burthen was avowedly imposed not for the legitimate purpose of raising a revenue, but for the monstrous purpose of rendering the Courts of justice inaccessible.

The preamble of the proclamation of the 25th March 1824, recites, that "Litigation and law-suits have increased in the Kandyan provinces to an extent productive of public inconvenience and vexation to individuals, by parties being called on to defend themselves against claims often unjust and frivolous, and many others being called away from their own business as witnesses; and that it is therefore necessary to devise a means of abating this litigious spirit."

The increase of litigation and law-suits is here stated as the substantive evil for which a remedy is to be sought, and the circumstance, that parties are called on to defend themselves against claims often unjust and frivolous, is merely added by way of aggravation; accordingly, penalties are inflicted, not upon those who institute unjust and frivolous suits, but upon those who institute suits of any kind.

It is the more remarkable that the plan of punishing the guilty only, instead of the guilty and the innocent together, for the crime of abusing the authority of Courts of justice, did not occur to those who framed the above-cited proclamation, because that plan had occurred to those who framed the proclamation of 1818, which is the foundation of the present system of Kandyan judicature. The 46th section of that proclamation runs thus:—"In civil cases, the losing party may be, by the second commissioner or agent of Government, discretionarily ordered to pay a sum to Government, of one-twenteth part of the value of the object in dispute, not exceeding in any case Rixdollars 50." And it certainly contains, though in a rude and imperfect condition, the true principle which alone can justify the imposition of any expense upon litigating parties.

The fine ought not to be fixed at the twentieth part of the value of the object in dispute, but to be adjusted according to the delinquency of the party and his ability to pay; neither is the sort of delinquency in question capable of being committed only by the losing party, though undoubtedly it is much more frequently committed by that party. But the party who gains the cause is sometimes deserving of punishment for the vexatious, oppressive or unfair means by which he endeavours to maintain his just rights; and among the natives of India in particular, it is by no means uncommon to find fraud and perjury, and all the base acts by which injury is inflicted through the forms of law, employed in supporting a just, or in resisting an unjust, demand.

1832. Cameron's Report.

Within its local limits, the Court of the Judicial Commissioner has jurisdiction over all classes of persons except military persons (which exception I shall presently notice more at length), and within those limits it has power to try all sorts of civil causes, and all sorts of crimes; but sentences which award corporal punishment exceeding 100 lashes, imprisonment with or without chains, or labour exceeding four months, or fine exceeding 50 Rixdollars, cannot be carried into execution until they have been referred to the Governor, through the Board of Commissioners, and confirmed by him. And in cases of treason, murder or homicide, the Court cannot pass sentence, but merely reports its opinion on the prisoner's guilt, and the punishment to be inflicted, through the Board to the Governor for his decision.

Jurisdiction.

The late Judicial Commissioner, in his answers to the questions addressed to him by Colonel Colebrooke, states that the jurisdiction of his Court does not extend to "charges of murder when any British subject may be defendant, who might be tried by the laws in force for the trial of offences committed by British subjucts in foreign parts, such British subjects being liable only to be tried by virtue of such law."

This opinion seems to be founded upon the proclamation of 2nd March 1815. The section of the ninth article of that proclamation points out a mode of proceeding on charges of murder (which being pronounced illegal by the law officers of the Crown in England, was afterwards repealed), with a proviso, that "as to such charges of murder wherein any British subject may be defendant, who might be tried for the same by the laws of the United Kingdom of Great Britain and Ireland, in force for the trial of offences committed by British subjects in foreign parts, no such British subjects shall be tried on any charge of murder alleged to have been perpetrated in the Kandyan provinces, otherwise than by virtue of such laws of the United Kingdon."

But the proclamation of the 21st November 1818, which, as a provisional arrangement, received the approbation of the Prince Regent's Government, provides by section 51, for the administration of justice to foreigners, under which term natives of Great Britan and Ireland seem to be included, and directs that in cases of treason, murder and homicide, they "shall be subject to the same jurisdiction now (*i. e.* by that proclamation) provided for Kandyans."

I apprehend therefore that the Court of the Judicial Commissioners has now the same jurisdiction in cases of murder over British subjects who are within the statute 33 Hen. 8, c. 23, as over any other persons.

In the maritime provinces, all persons, military as well as civil, are amenable to the civil (*g*) Courts of criminal jurisdiction; but in the Kandyan provinces, military persons can only be tried by Court-martial for offences not of a military nature, though I think it cannot be questioned that there is now such a form of the King's civil judicature subsisting in those provinces as would have ousted the jurisdiction of Courts-martial over offences not of a military nature,

(*g*) The word civil is here used in contradistinction to military.

had not a special exemption been made in constituting the civil judicatures, of persons liable to military discipline.

By the second section of the ninth article of the Proclamation, dated 2nd March 1815, which announces the convention entered into by Sir Robert Brownwrigg and the Kandyan chiefs, it is provided, that commissioned or non-commissioned military officers, soldiers or followers of the army, usually held amenable to military discipline; shall in all civil and criminal cases, wherein they may be defendants, be liable to the laws, regulations and customs of war, reserving to the Governor and Commander-in-chief, in all cases falling under this ninth article, an unlimited right of review over every proceeding, civil or military, had by virtue thereof, and reserving also full power to make such particular provisions conformably to the general spirit of the said article, as may be found necessary to carry its principle into full effect.

In a despatch, dated the 13th October 1815, Lord Bathurst wrote thus to Sir Robert Brownrigg on this subject: "In order to prevent any uncertainty, as to the liability of military persons in the Kandyan country to remain subject to martial law, I am to acquaint you, that although His Royal Highness the Prince Regent has generally approved the convention by which that territory has become annexed to His Majesty's dominions, His Royal Highness has declined adopting the pre-existing laws and Courts of Kandy, as forms of the King's civil judicature, until more detailed information shall have been obtained as to the nature of the laws, and the changes which it may be expedient to introduce in their administration:" and in a Proclamation, dated, 31st May 1816, which embodies the despatch just quoted, Sir Robert Brownrigg confirms, as follows, the provisions on this subject contained in the Proclamation of the 2nd March 1815: "Fourthly; concerning the second section of the said ninth provisional article, that the same, being in substance conformable to the provisions of the Mutiny Act and Articles of War, as applicable to the present state and condition of the Kandyan country, will, until his Majesty shall otherwise provide remain in force and extend to all persons who are commissioned or in the pay of His Majesty as officers, or who are listed or in pay as soldiers."

After the insurrection of 1818, Sir Robert Brownrigg made new and general provisions for the administration of justice in the Kandyan provinces, by a Proclamation, dated 21st November of that year.

The 51st section of that Proclamation is as follows: "The people of the low country and foreigners coming into the Kandyan provinces, shall continue subject to the civil and criminal jurisdiction of the agents of Government alone, with such extension as His Excellency may, by special additional instructions, vest in such agents, and under the limitation as to execution of sentences in criminal cases herein-before provided as to Kandyans, in the 42nd clause, until reference to the Governor through the Board of Commissioners, excepting in cases of treason, murder and homicide, in which such persons shall be subject to the same jurisdiction now provided for Kandyans, and that the same line shall be pursued in cases wherein a Kandyan moorman shall be defendant."

The word "*continue*" implies, of course, that no persons were to be subject to the jurisdiction of the agents of Government by force of

this section, who were not so before; and the instructions issued to the British judicial functionaries on the same day and on the same subject, in pursuance of the powers reserved in this section, are headed, "Additional Instructions, in respect to jurisdiction over natives of the maritime provinces or other native foreigners or Europeans not in His Majesty's or the Honourable Company's military service."

The result is, that military persons are not held amenable to the civil Courts for any offences whatever.

Appellate Jurisdiction.

The proceedings of the local judges in the Kandyan provinces are still more insufficiently controlled by appellate judicatures than those in the maritime provinces.

I have already noticed the way in which causes are carried up from an inferior to a superior tribunal, without any decision taking place in the former; but there is also in civil cases a formal appeal—

From the Courts of the agents of Government to that of the Judicial Commissioner, in cases wherein land is the object in dispute, or personal property exceeding 150 rix-dollars in value; and

From the Court of the Judicial Commissioner to the Governor, in cases of the same description.

So that all cases which may be carried up by appeal from the Courts of the agents of Government to the Court of the Judicial Commissioner, may be further carried up from that Court to the Governor.

The Governor is thus the judge of appeal in the last resort from all the local Courts, and the principle of unity, considering the Kandyan provinces as distinct from the Maritime, is preserved; and so far the system is good. But there is no sufficient reason why the causes which arise in the provinces should be carried through two stages of appeal, and the Governor is in no respect the proper officer to exercise the appellate function.

He does not hold any Court of appeal, but refers the papers sent up to him from the Judicial Commissioner's Court to the Deputy-Secretary or the master in equity, who prepares them for his consideration, and then, without any discussion, and generally without any assignment of reasons, the Governor gives his directions for affirming, reversing or altering the decree of the Court below.

Sir Edward Barnes, in a despatch addressed to Lord Bathurst, on the 4th January 1827, has stated, that "without some person to prepare these cases for submission to him, it would be impossible for him to find time to go over the voluminous proceedings;" so that the Governor is obliged to depend, for the grounds upon which he forms his opinion, upon an irresponsible person who peruses the papers in private, and without any communication with the parties or their agents. The privacy of this tribunal is the more objectionable, because the Governor has declared, that he possesses an equitable jurisdiction, and an equitable jurisdiction, where there are no positive rules of equity, means an unlimited discretionary power over the law.

This power is declared to be vested in the Governor by a letter from the Deputy-Secretary to Government to the Board of Commissioners at Kandy, dated 10th July 1829, of which the following is an extract:—

1832. — Cameron's Report.

"In reference to the case of Nilegoodegedera Kalu Ettina *versus* Kapoogedera Menika, one of those now sent, I am directed by the Governor to request that you will acquaint the Judicial Commissioner that he is bound to decide in all cases strictly according to the *law*, equity of the case resting, His Excellency conceives, solely with himself."

There is no appeal in criminal cases ; but by the 42nd section of the proclamation of 21st November 1818, it is provided, that "in criminal cases no sentence, either by the second commission or the agents of Government, shall be carried into effect, if it awards corporal punishment exceeding 100 lashes, imprisonment with or without chains or labour exceeding four months, or fine exceeding 50 rix-dollars, unless after reference to the Governor through the Board of Commissioners, which will report on the case and sentence, and after his Excellency's confirmation of such sentence;" and by the 44th section, "in all cases of treason, murder or homicide, the trial shall be before the Courts of the resident or of the second commissioner and his Kandyan assessors, whose opinion as to the guilt of the defendant, and the sentence to be passed on any one convicted, is to be reported through the Board of Commissioners, with their opinion also, to his Excellency the Governor, for his determination."

Public Prosecutor.

In the Kandyan provinces there is no public prosecutor, or rather the functions of the public prosecutor are united with those of the judicial commissioner, the chief criminal judge. The observations which, in conjunction with Colonel Colebrooke, I had the honour to make to your Lordship's predecessor in office, upon the trial of Wilbawe Mudianse for high treason, in a despatch dated 23rd November 1830, and the measures which your Lordship was pleased to adopt in consequence of that despatch, assure me that any further strictures upon this incongruous combination of duties are quite unnecessary.

Power of enforcing Labour by Punishment.

I have now described to your Lordship, as far as I think it necessary for the purpose of this report, all that can be properly called the judicial establishment both of the Maritime and Kandyan provinces. But the system of forced labour which, as your Lordship is aware, obtain in Ceylon, makes it necessary that a power of punishing those who refuse to work should reside somewhere. The power of punishing of course supposes the power of investigating the facts which authorize the punishment ; and the functionaries in whom these powers reside must be considered as in that respect judicial.

Maritime Provinces.

These functionaries are, in the maritime provinces, "every head of a department, or other person superintending the execution of any public service."

The powers they exercise are, I presume, an inheritance transmitted from the native Government through the Portuguese and Dutch to the British. The first legislative notice I find of them is a

Government advertisement of the 28th April 1802, of which the following is an extract: "This is to give notice, that nothing contained in our proclamation of the 13th February last, or any other law or order of Government now existing, takes away, or is meant to take away, the right which every head of a department, or other person superintending the execution of any public service, has and necessarily must have to inflict reasonable and moderate correction immediately on the persons employed under him, when they disobey or neglect his orders, such punishment, however, by no means exceeding 25 strokes with a rattan." 1832.

Cameron's Report.

The import of the general words by which this Government advertisement describes the persons subject to this power, has been narrowed by the construction adopted by the Supreme Court, in a case wherein the defendant justified under it an assault and battery on the plaintiff. The Chief Justice said, "The case appears in evidence to be, that the defendant, holding the office he describes (deputy commissary general), did beat the plaintiff, by giving him seven or eight strokes with a horsewhip, the plaintiff being naked, and that he was in consequence bleeding.

"It appears further, by a letter of the defendant given in evidence, that he was persuaded of his right to inflict the punishment by force of the advertisement in question.

"To look therefore to the true meaning of the advertisement is the only duty remaining for the Court, in deciding whether the plaintiff be entitled to any damages.

"It is the misfortune of this country that the compelled service of many of its inhabitants is required for carrying on the purposes of Government; there is always also a proportion of the population whose misdeeds have subjected them to be kept at hard labour by sentence of Courts or magistrates; to persons thus obliged to work, either from state necessity or their own offences, labour must of course be unpalatable; and not having the stimulus of wages or any other reward for the execution of their task, they would unless impelled by fear of punishment, be disobedient or negligent; and, admitting the justice of thus exacting the labour, the justice of enforcing that labour must be apparent, and upon this ground the advertisement seems to rest with perfect propriety: it speaks of coolies and other workmen, and its republication in July 1816 by Government, is stated to be in consequence of the insubordination of convicts.

"But a peon is a person receiving wages, holding a situation, dismissal from which is of itself a severe punishment, and to induce a man to retain which, no dread of punishment appears to be at all necessary.

"If the advertisement be extended to a peon, where is it to stop? Is every head of a department invested with power to punish corporally all the persons of his department who may in his opinion be disobedient or negligent? Is the Chief Secretary to have this power over the deputy, or is the Chief Justice to exercise it over the registrar? Yet these are heads of departments superintending the execution of public services. I put these absurd and monstrous consequences of the construction contended for, in order to show how utterly impossible it is to believe that it could have been in the contemplation of Government.

1832. — Cameron's Report.

"I take this upon the broad principle, I do not narrow the case by saying that even this advertisement does not justify punishing with a *horsewhip* when it prescribes a *rattan*; but I say that in this instance, it is no justification of any punishment whatever, nor in any case but those of compelled services, which being of course reluctantly given, and required without any chance of reward, can only be enforced by the terror of punishment.

"I believe the defendant to have acted in a persuasion that he was right; it is necessary to show him and others that he was wrong, and at the same time not to press too strongly upon a mistake in conduct: on the other hand, it being a pauper suit, he is not subjected to pay any costs to the plaintiff: to meet the justice of the case, and give a reasonable compensation to the plaintiff, as well for his suffering as his subsequent loss, the Court wards 100 rix-dollars damages to be paid by the defendant. No costs."

I do not know whether the Provincial Courts would consider themselves bound by the construction here put by the Chief Justice upon the Government advertisement; and it is to be observed, that in this case the Governor thought proper to authorize the defendant to charge the Government in his accounts with the amount of the damages awarded against him and the costs of his defence, but the decision of the Supreme Court seems to rest the power in question upon its proper foundation.

Whether the general description of the persons who are to exercise these powers includes the native headmen who may be "superintending the execution of any public service," is a point on which I cannot express myself decidedly.

The document which suggests this doubt, taking the body of it and the marginal abstract together, and considering the mode of its publication, in company with legislative instruments, affords, independently of its ambiguity, a curious specimen of confusion between a general legislative enactment and a judgment upon an individual offender. It runs thus:

"Minute.

"By his Excellency the Governor.

"It having been brought to the knowledge of Government that Christian Peris Vidahn Arachy, of Pallepatto, in the Salpitty Korle, has presumed, under colour of his official authority, to inflict corporal punishment on one Anjigay James, an inhabitant of the same place; and the Vidahn Arachy having, on an inquiry into the case by the Honourable R. Boyd, Esq., alleged in his defence that he was empowered to inflict corporal punishment by virtue of the Government advertisement published at Trincomalee, under date the 28th April 1802, his Excellency deems it his duty, whether such plea be an error or a pretence, to obviate the dangerous influence of such precedent by directing, and it is hereby directed, that the said Christian Peris be forthwith dismissed from the employ of Government.

Headmen not considered in general authorised to inflict corporal punishment under the advertisement of 28th April 1802.

"And it is further ordered, that this Minute be translated into Singhalese, and printed, and that a sufficient number of copies thereof

be distributed through the office of the Commissioner of Revenue, for the information of the several Kachcheries.

"By order of His Excellency the Governor,

(signed) JAS. SUTHERLAND,
Dep. Sec. Jud. Dep."

"King's House, Colombo,
18th December, 1816,"

And I think that, considering it as a law, no great ingenuity would be required to decide upon plausible reasons, that any particular case was within or not within its operation.

Kandyan Provinces.

In the Kandyan provinces, by the 48th and 49th sections of the Proclamation of 21st November 1818, a power is given, or I should rather say, confirmed, to the adigars, disaves, chiefs, mohottales, liennerales, and korales, to punish disobedience of orders with various degrees of fine, imprisonment and corporal punishment; "provided that the several persons on whom the above power is exercised shall be duly and lawfully subject to the orders of such adigars, disave, chief, mohottale, liennerale or korale, and that no such power shall be exercised on persons holding office, or on persons of the low country, foreigners, or on Moormen of the Kandyan provinces."

By the 33rd section of the same Proclamation, His Excellency empowers and directs that the Board of Commissioners in Kandy collectively, or in their several departments, and the agents of Government in the provinces, shall punish all disobedience and neglect by suspension or dismissal from office, fine or imprisonment, as particular cases may require and deserve.

Your Lordship will observe, that no power of inflicting corporal punishment is here conferred upon any British functionary, but the Board of Commissioners in Kandy nevertheless exercise such power, and, as I apprehend, exercise it legally.

The power of the ancient sovereigns of Kandy resides in the British Governor, limited only by the responsibility for its reasonable exercise, which he owes to His Majesty.

By the 8th section of the above-mentioned Proclamation, the general execution and judicial authority in the Kandyan provinces is delegated by his Excellency to the Board of Commissioners; and it is, I presume, under this general delegation of authority that the board inflicts corporal punishment for disobedience of orders.

Although in treating of judicial establishments and procedure, I have been inevitably led to the system of forced labour, yet the recommendation I shall have to make to your Lordship on this subject does not belong to this report, for it will not be any modification of those functions of the existing tribunals which I have just deseribed, but the entire abolition of the system which has rendered those functions necessary.

1832.

Cameron's Report.

RECOMMENDATIONS.

I have now given your Lordship such an account of the judicial establishments and procedure actually existing in Ceylon, as will, I think, enable you to judge how far they fulfil their legitimate objects, and how far the reforms which I am about to suggest are really called for. I shall now lay my suggestions before your Lordship in the form of a series of recommendations, and I shall subjoin to each recommendation, or, in some cases, to several taken together, the reasons which explain and justify them.

The recommendations themselves are expressed in general terms, the details being reserved for a Charter, which, if your Lordship shall approve the principles of the recommendations, will repeal the Charters now in force, and establish the Supreme Court upon a new plan, and an ordinance will repeal the regulations of Government, and other legislative instruments, under which the local Courts now perform their functions, and create an uniform system of local judicature throughout the Island.

Recommendation 1.

1. I recommend that so far as regards the judicial establishment and the procedure according to which its functions are performed, complete uniformity should be introduced throughout the whole Island.

Reasons for Recommendation 1.

It would be superfluous to enter into a discussion of the arguments in favour of establishing an uniform system of judicature throughout a territory which is subject to one and the same Government. But it is proper on this occasion to remark, that the argument, which is sometimes successfully urged against such a measure, has no application to Ceylon.

The argument I allude to is formed upon the attachment which mankind in general, and the oriental races in particular, feel for systems which have been long established among them, and which are commonly connected with their religious opinions.

This argument, I say, has no application to the case of Ceylon; for the Courts of justice in that island, and the forms of their procedure are, without exception, the creations of the British Government, and have not in the eyes of the natives anything of the sanctity of religion or of antiquity.

A fairer field than the Island of Ceylon can never be presented to a legislator for the establishment of a system of judicature and procedure, of which the sole end is the attainment of cheap and expeditious justice.

Recommendation 2.

2. I recommend that every Court of original jurisdiction throughout the Island shall have exclusive jurisdiction (*h*) over all causes, civil and criminal, and all questions of whatsoever kind, in which the

(*h*) In the Ordinance by which this recommendation will, if approved by your Lordship, be carried into effect, it will be necessary to provide for the rare case of a judge of original jurisdiction being himself a party to a suit, which, under the general words of the recommendation, would be triable by himself.

intervention of judicial authority is necessary, which arise within the limits of its district, except only causes or questions in which the party against whom the proceeding is instituted in a Court of justice, or a person acting in the matter complained of under the authority of a Court of justice, and except such criminal causes as by the 19th recommendation are to be tried by a judge of the Supreme Court on circuit.

Reasons for Recommendation 2.

The usual practice of dividing judicial business among judicial functionaries, according to its nature as civil or criminal, legal or equitable &c., appears to me in all respects much less expedient than the division of it into integral portions according to districts.

1st. A greater number of functionaries is necessary in the former plan, for the portions into which judicial business must be divided, if the nature of the business be taken for the principle of the division, are never equal, consequently a local judge to whom one of the smaller portions is allotted, will not have enough to do, supposing that the larger portions are not too large for one judge. Thus, in the actual circumstances of Ceylon, the Provincial Judges in general transact much less business than the Sitting Magistrates, so that if the latter are not overburthened, the former have not sufficient occupation.

2nd. A greater number of suits must be instituted, a greater quantity of judicial machinery must be put in action, in order to attain the same end, and frequently one portion of the machinery must be employed only to impede the operation or to destroy the results of another portion.

3rd. As it is not possible to mark out the boundaries of contiguous subjects of judicature, as precisely as the boundaries of contiguous districts, many more, and much more complicated questions of jurisdiction arise under the former plan, by which the time and money of the suitors are fruitlessly consumed.

This reason applies with the greatest possible force in a country like Ceylon, where the general ignorance of the natives prevents them from understanding technical distinctions, and where there are no practitioners, except in the capital, capable of directing one who is searching for a judicial remedy to which Court he should apply, if the choice is made to depend upon such distinctions.

Though I propose to carry the principle of uniting the various judicial functions in one Court, to an extent which I believe is unexampled, yet the principle itself is no novelty in Ceylon; and I rejoice that I have it in my power to fortify my theoretical view of its merits by the opinion of Mr. Justice Marshall on its practical operation.

That learned judge, in speaking of the union, of criminal and civil jurisdiction in the person of the Sitting Magistrate, expresses himself thus :—

"Indeed, I am inclined to think that the union of the two jurisdictions in the same person, supposing him to possess diligence and a good understanding, is very beneficial to the natives, by referring them in all their little grievances of whatever description to the same arbitrator.

"Another very material advantage derived from this combination of authority arises out of the difficulty which so frequently presents

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itself of deciding whether the wrong complained of should be treated as a civil injury or a criminal offence; if the complainant mistakes his course, and applies to the wrong side of the Court for redress, he is transferred to the other side, and his case may be heard at once, instead of his being driven to seek another tribunal."

At first sight, the principle of the division of labour seems opposed to the plan which I recommend, but that principle applies only to cases in which practical skill is the object to be attained. Whenever theoretical knowledge is required, an acquaintance with all the branches of a subject is essential to the complete understanding of any one. It is universally admitted that an enquiring judge or barrister is made much more competent to the peculiar business of his Court by an acquaintance with the common law.

The object of the first exception in this recommendation is to prevent the collision of co-ordinate judicial authorities.

Thus, if a mandate, in the nature of a writ of *habeas corpus*, issue from a Court of original jurisdiction, and it appear upon the return that the prisoner is in custody under the authority of a co-ordinate Court, the prisoner must be remanded without any examination into the legality of the commitment. The legality of the commitment can only be examined by means of a mandate from a superior Court, under the 14th and 18th recommendations.

The reason for the second exception will be found under the 19th recommendation.

Recommendation 3.

3. I recommend that each Court of original jurisdiction shall consist of one judge and three assessors.

That the assessors shall be chosen as jurymen (*i*) now are in the maritime provinces.

That the same individuals shall sit as assessors for one day, and for one day only at a time, unless the judge, for special reasons to be asigned by him in open Court, shall otherwise direct, or unless the assessors require time to consider their verdict, in which case new assessors shall be impanelled. (*k*).

That when the parties have concluded their pleadings, evidence and arguments, the judge shall sum up the evidence, and state his opinion of the law to the assessors.

Who shall thereupon give such verdict as any two of them can agree upon.

Which verdict shall be immediately recorded by the registrar, but shall not prevent the judge from giving a contrary decision, if he thinks fit.

(*i*) I do not mean to pledge myself not to suggest any alteration in the mode of choosing the jury, but I have chosen to express my recommendation respecting assessors by reference to the mode of choosing jurymen, because I thus make it evident, without embarrassing your Lordship with minute details, that the recommendation involves no invincible practical difficulty.

(*k*) It will sometimes happen, by the adjournment of cases which have been partly tried, that the trial will not take place before the same assessors. This is a defect; but I perceive no remedy which will not be productive of greater inconvenience.

That excepting so far as regards the binding effect of their verdict, the assessors shall have all the privileges of a jury.

Reasons for Recommendation 3.

A jury, considered as the organ of a judicial decision, is an institution which it would be very difficult to defend. But considered as a portion of the public placed in an official station, which secures to it a respect of the judge, armed with power to interrogate the judge and the witnesses, and thus to acquire a complete knowledge of the cause compelled by penalties to be present in Court, and compelled to attend the proceedings by the necessity of pronouncing a public opinion upon then, it is invaluable.

It is invaluable, I think, everywhere; but in our Indian possession, it is, when coupled with the effective appeal which I shall hereafter recommend, the only check and the only stimulus, which can be applied to a judge placed in a situation remote from a European public, and necessarily almost insensible to the opinion of the native public, with whom he does not associate.

In England, as the verdict of the jury is binding, it has been found necessarily in civil cases to neutralize the effect of it by withdrawing the law as much as possible from their consideration, and by granting new trials as often as the Court thinks the verdict wrong. It seems to me, however, that when a judge, checked by the presence of a jury, differs from a jury, the presumption is very much in favour of the opinion entertained by the judge, and, therefore, that his opinion ought to govern the decision, subject to correction by the appellate jurisdiction.

A new trial is certainly a very cumbrous, inconvenient and costly mode of correcting an erroneous decision upon the evidence which has actually been received. Such a proceeding seems in reason to be only applicable to the case in which material evidence can be produced after the trial which, without any default of the parties, was not produced at the trial; and even in that case, there is no expediency in re-commencing the examination of the whole case *de novo*, and thus putting the parties to the risk, by the death of witnesses and the destruction of documents, of losing all the benefit of the evidence which has already been adduced.

I observe that in the Third Report of the Commissioners appointed to inquire into the practice and proceedings of the Supreme Court of common law, those very learned persons have proposed to obviate this last inconvenience by providing that the rule nisi for a new trial shall express on what particular ground the new trial is applied for, and that the party in whose favour the new trial is granted shall always be precluded upon such trial from entering into any other part of the case but that upon which the rule nisi was obtained, unless he should be authorized to do so by the special permission of the Court, to be expressed in the rule absolute.

"This last regulation," the Commissioners observe, "would tend materially in many cases, to diminish the expense of a second trial, and to make its operation more just and equal between the parties. It would also, they further observe, materially diminish the number of motions for new trials, it being well known that such motions are often made upon grounds little connected with the real justice of the

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case, but which serve as pretexts for obtaining a second trial upon the general merits of the action."

But this improvement will leave untouched the other objections to the practice of correcting erroneous verdicts by granting new trials, all which will be obviated by placing the power of deciding in the judge, and leaving his decision to be corrected, as justice may require, by the appellate Court.

I do not deny that in criminal cases, where the verdict of a jury, according to English law, is binding in substance as well as in name, much benefit has resulted to the administration of justice; but I am of opinion, that verdicts against the direction of the judge have, in general, been verdicts against law, and however desirable it may be that a bad law should not be executed, it is still more desirable that a bad law should not exist. The amendment therefore of the law is the true remedy in such cases, not the organization of a tribunal to obstruct its execution.

I trust your Lordship will not for a moment suppose that I am obtruding my opinion upon the reforms which may be expedient in English procedure; my only object is to give satisfactory reasons why, in recommending for Ceylon an institution in the nature of a jury for the trial of civil causes, I do not propose to imitate indiscriminately the English form of that institution, and in doing so, I am naturally anxious to avail myself of such high authority as that of the authors of the Report above quoted. That high authority is with me when I denounce the evil; it is not against me when I suggest the remedy; for it is obvious that there may be abundant reasons why those incidents of the trial by jury which I have proposed to alter or omit, could not be removed in this country without producing greater inconvenience, and consequently it cannot be inferred from the reverential moderation with which the Commissioners have touched the institutions of their native country, that they would have stopped at the same point, if they had been recommending measures for a people who have no attachment for the forms of judicial procedure existing among them.

Recommendation 4.

4. I recommend that the pleadings shall consist of an oral altercation between the parties in open Court, and that a minute thereof shall be made by the officer of the Court under the direction of the judge.

Recommendation 5.

5. I recommend that at the time of pleading each party shall state the names of the witnesses whom he intends to produce at the trial, and the matters which he expects them respectively to prove, and shall describe the documents which he intends to produce at the trial, and that a minute thereof shall be made by the officer of the Court, under the direction of the judge.

Recommendation 6.

6. I recommend that each party shall be subject to cross-examination by his adversary as to the statements made by him in pleading and as to those relating to evidence, and that each party, if he desires it, shall be assisted by an advocate or proctor, who may examine him in chief, and cross-examine his adversary as to their respective statements.

7. I recommend that no common subpœna or subpœna duces tecum shall issue to any witness at the suit of any party, unless the judge shall be satisfied by the viva voce examination of the party, that the person against whom the subpœna is moved for is a material witness in the cause, and that the documents to be mentioned in the subpœna duces tecum are material evidence in the cause.

Recommendation 7.

8. I recommend that no motion which, according to the present practice, is grantable by the Court upon affidavit, shall be granted, unless the Court be satisfied by the viva voce examination of the person upon whose affidavit the motion would, according to the present practice, be made, that the grounds of the motion are true.

Recommendation 8.

9. I recommend, that when any person, not a party to the suit, shall be examined viva voce under the 8th recommendation, he shall be examined upon oaths, and that when any party to the suit shall be examined viva voce under the 6th, 7th or 8th recommendation, he shall not be examined upon oath, but shall be liable to punishment under the 11th recommendation.

Recommendation 9.

10. I recommend, that all viva voce examinations shall take place in open Court, except that if the judge shall be satisfied by the viva voce examination in open Court of the proctor of a party with or without the viva voce examination of other witnesses in open Court, that such party is unable to attend the Court, and that irreparable consequences are likely to result from delay, he may permit such party to be examined by commission, and that if the judge shall be satisfied by the viva voce examination of a party, with or without the viva voce examination of other witnesses in open Court, that a witness is unable to attend the Court, he may permit such witness to be examined by commission.

Recommendation 10.

11. I recommend, that at the termination of the suit, the judge, taking and recording the opinion of the assessors, shall punish by fine or imprisonment, or both, any party to the suit who in his, the judge's, opinion, whatever may be the opinion of the assessors, shall have been guilty of an attempt to pervert or obstruct the course of justice.

Recommendation 11.

Recommendation 12.

12. I recommend the total abolition of all stamps upon legal proceedings, and of all fees of Court.

Recommendation 13.

13. I recommend, that the expenses of the witnesses on both sides in all cases shall be paid by the public.

The connection between these eight recommendations may not at first sight appear quite obvious; but I have found it convenient, in order to avoid repetitions, to state together the reasons which appear to me to justify them.

Reasons for Recommendation 4. 5. 6. 7. 8. 9. 10. 11. 12. and 13.

I shall begin by remarking, that the general ignorance and mendacity of the natives, and the want of any competent legal practitioners, except in the capital, render it necessary for the ends of

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justice, that in Ceylon a great deal of legal business, which in more highly civilized countries is usually transacted by the parties, their counsel and attornies in private, should be transacted in open Court with the assistance and under the superintendence of the European judge.

The moral and intellectual condition of the natives is such, that the European magistrate who is to distribute justice among them, can only do so effectually by the exercise of something like a paternal authority; he must allow the parties themselves to come and relate their own story to him; he must be counsel for both parties, that is, he must be counsel for each so far as each appears to have truth and justice on his side; he must assist them in putting their statements into that form which will show whether there is really any question between them requiring for its decision, the examination of witnesses or documents, or a more deliberate consideration of the law applicable to their case, and which will also show at any future time precisely that it was which, upon that occasion, transivit in rem judicatum.

In England no judicial operation is performed upon the raw material of a suit until it has undergone a very elaborate process of dressing, after which it is presented to the consideration of the judge in the pleadings or in the speeches of counsel, stripped of irrelevant matter, and reduced to one or more distinct questions of law or fact, to which questions only arguments and evidence are to be applied.

Whatever may be thought of the merits of this system in England, where there is a large body of professional men, whose skill and knowledge is scarcely inferior to that of the judges themselves, and where the evils arising from secrecy are much diminished by moral retraints, it is totally inapplicable to that state of society in which the Europeans in Ceylon are called upon to exercise judicial functions.

Such is the total disregard of veracity among the natives, that not only are the true statements of the opposite party denied in pleading, in the hope that his proofs may fail, not only are false statements made for the purpose of delay, without the intention of supporting them by evidence, but according to the universal opinion of Europeans and the admission of many natives, such statements are habitually made with the deliberate purpose of imposing them upon the Court for truth, by means of forged documents and perjured testimony.

A consultation, then, between a native suitor and his native legal adviser, has not in general for its object the presenting his case, such as it really is, in the most favourable point of view which the rules of law permit. It is too often a conspiracy to commit every species of crime which may conduce to the object the party has in view; and this too, whether that object itself be just or iniquitous.

It may not be possible to prevent such conspiracies from taking place; but it is certainly possible to prevent in a great degree the evil effects of them, by bringing the whole suit, from begining to end, before the European judge and the public, by never suffering the authority of the Court to be used for any purpose whatever, until the party who invokes it has been personally examined in open Court, and has thus satisfied the judge that the grounds of his application are true and sufficient.

Under the present system, the pleadings are in writing, and are

prepared in secret by the parties and their respective advisers. No measures are taken to ascertain whether the parties believe themselves the allegations they make. No punishment is inflicted upon a party who makes an allegation knowing it to be false. The pleadings are as deficient, too, in precision and regularity as they are in veracity. It even appears that the system which I am recommending to your Lordship has sometimes been already adopted in practice from absolute necessity. Mr. Drieberg, a proctor of the Provincial Court of Colombo, states, that "the proceedings in this Court are so simple and void of formalities. that the poor natives get the pleadings drawn by private persons, sometimes by the clerks and volunteers in the office of the Court, or by whomsoever they can get it done cheaper or gratis, which sometimes are so unintelligible, that the judge on the day of hearing, not being able to comprehend them, takes down the verbal statement of both parties, and then enters into evidence, to do which (he adds), requires much time and patience, as it is difficult to get from a native a direct answer to any question."

I do not at all doubt the correctness of the latter part of this statement; but I think that the end to be attained by oral pleading is well worth the time and patience required, provided the parties are made aware that any attempt to embarrass or mislead the Court will meet with certain punishment.

The parties endeavour to deceive the Court now without scruple, because whether they are successful or not in the attempt, they are sure of impunity.

It is to be observed that Mr. Drieberg is here speaking of the Provincial Court of Colombo, where such suitors as can afford it may obtain the assistance of European proctors, an advantage from which the suitors in the other Provincial Courts are debarred.

Since integrity and knowledge, then, are to be found only in the judge, the pleading, if it is to be of any use at all, must take place in his presence. The parties must be examined by him, and cross-examined by each other. The judge must assist the parties with his advice in putting their statements into regular form. It appears by the year-books, that when the pleadings in England were oral, the English judges used to do so; and on such applications as are made by motion, the granting or refusing which is in the discretion of the Court, they are still in the habit of suggesting to the parties that course by which his object may be best attained consistently with the interests of justice.

The advantages of precision, and of adherence to forms in pleading, are very great; and the neglect of them has brought cheap and summary modes of proceeding into disrepute. But these modes of proceeding are by no means incompatible with adherence to forms, provided only the judge be learned and practised, and the forms palpably and directly pointed towards the real end in view.

By means of oral pleading, all that time and money will be saved to the suitors which they now waste in preparing to prove or disprove matters which there is no real ground for contesting, and which an examination of each party by an impartial judge, and by his adversary, would show that there is no real ground for contesting.

By means of the seventh recommendation, subornation of perjury and forgery of documentary evidence, crimes of which the frequency

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strikes every European with horror, will be rendered comparatively difficult. By that part of it which regards subpœnas, that monstrously abusive practice, now so common, of summoning a multitude of immaterial witnesses for the purposes of afterwards moving for delay on the ground of their absence, will be in great degree, if not entirely, prevented. As regards the interest of the witnesses, too, the abusive exercise of that power which must be granted to every man of compelling other men to leave their own business, and repair with any documents in their possession to a Court of justice, must, if this regulation be adopted, be of very rare occurrence.

The advantage of *viva voce* examination and cross-examination, as a mode of ascertaining facts, over the mode by affidavit, is, I believe, universally admitted; and I shall only remark that in the East the difference between the two, in respect of their probative force and their tendency to prevent perjury, is far greater than in Europe; because, from the defect of moral principle among the Indian races, the frequency of perjury depends almost entirely upon the chance of escaping detection.

In England, however, where actions arising in all parts of the country are brought in the Courts of Westminster, all the facts of which the proof is necessary to justify the Court in lending its authority to a suitor, except only those which are proved at the trial, are proved by affidavit, because the advantage of having them proved by *viva voce* evidence would be overbalanced by the inconvenience the parties would suffer if they were obliged to come to Wesminster every time that it may be necessary in the course of a suit to make an application to the Court. But whenever the whole suit is conducted at the same place where the trial is had, this argument in favour of affidavit evidence has no application.

It is indeed one of the great advantages resulting from the system of local judicatures that except in the rare cases of sickness or unavoidable absence, every person on whose testimony the Court is obliged to rely from the beginning to the end of the suit, may, without overbalancing inconvenience, be made to undergo personal examination by the judge and the opposing party.

To gaurd against falsehood, prevarication, and every sort of attempt to pervert the course of justice, I have proposed to invest the judge with the power of imposing fines at the termination of the cause; and, at the same time, I have recommended the abolition of all fees of Court and stamps upon legal proceedings.

These are in reality fines which fall indiscriminately (always in the first instance, and sometimes ultimately) upon the honest and dishonest suitor, upon the oppressor and his victim. Even under the present system, where it works as one must suppose its inventors intended it to do, such fines are really paid, although not *eo nomine*, by the party who is found to be in the wrong. They consist of the fees and stamps upon his own proceedings, and those upon the proceedings of his adversary, which he is made to reimburse under the name of costs. The question therefore, which the judge will have to decide, *viz.*, who is to be fined, will be no other in substance than the question which he now has to decide, *viz.*, who is to pay costs; but the fines, instead of operating, as they now do, to deter those who are seeking to protect their rights by legal proceedings, will operate only

to deter those who use such means for purposes of fraud and oppression.

It is very important to remark too, that when fines upon the misuse of legal proceedings are disguised under the name of costs, they no longer bear the appearance of a punishment; they are not apportioned, as they ought to be, to the wealth and the delinquency of the party fined, and they do not bring upon him any of that obloquy which ought to be attached to his conduct.

With regard to any portion of revenue which may be lost by the alteration I suggest, it can be that portion only which constitutes a tax upon oppressed innocence, and I apprehend that no legislator would ever have thought of proposing such a tax, if its iniquity had not been concealed from his view by being mixed up with the general mass of taxes upon law proceedings, from which it is, by the proposed plan, distinctly separable.

Moreover, inasmuch as the fines to be imposed by the Court will be regulated in amount by the delinquency of the party on whom they fall and his pecuniary ability, the revenue derived from this source may very possibly not be diminished at all. Any future reduction of it can only take place by the diminution of that species of crime which consists in the abuse of legal proceedings, an effect which would amply compensate the Government and the community for the pecuniary loss.

To all the abuse of legal proceedings a crime seems almost like an innovation in language, yet in the primitive days of jurisprudence there are traces of punishment denounced against such conduct. Such was the fine *pro falso clamore* in our own ancient system. But in latter times it seems to have been thought impossible to separate the abuse of legal proceedings from the legitimate use of them, and the fine has been imposed not *pro falso clamore*, but simply *pro clamore*. The suitor has been visited with a pecuniary mulct for telling his story to the tribunal appointed to redress his grievances, and at the same time stamps and fees of Court have been defended upon the alleged ground that they discourage vexatious litigation, whereas in truth they discourage litigation in general, when the party desirous to litigate is poor, and where the party is rich, they encourage vexatious litigation by rendering a law-suit a more efficient instrument of oppression.

The object to be aimed at is, that the services of the tribunals should be afforded gratuitously to those who ask them *bona fide*, but that those who ask such services *mala fide*, should not only not receive them gratuitously, but should be made to pay a heavy penalty for the abusive exercise of an essential privilege.

If the attainment of this object, or a reasonable approach to it, were impossible, it would not follow that the indiscriminate infliction of fees and stamps is defensible, but in reality there is no impossibility in deciding when the proceedings are terminated, whether any party has availed himself of the services of the court honestly or fraudulently, provided at every step those means be adopted which are admitted in other cases to furnish an effective criterion; consequenty there is no good reason why any man should be punished for suing or defending himself honestly, or why any man who sues or defends himself dishonestly, should escape with impunity. As

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vexatious law proceedings are one of the most common modes by which the natives of Ceylon seek to gratify their malignant passions, the practical application of these principles in that country is of the utmost importance, and this must be my apology to your Lordship for the length of the present discussion.

The reasons why I have preferred the imposition of fines at the termination of the cause to the administration of an oath, and the consequent penalties of perjury, in the case of the examination of a party to the suit, are as follows :—

The parties to the suit being before the court from the beginning to the end of the proceedings, and having the opportunity of offering all the evidence and arguments which can throw light upon their own statements, the matter of defence for a party to the suit suspected of endeavouring to mislead the Court is not, as the matter of defence for a witness accused of perjury often is, extraneous to the suit ; the judge, therefore, at the termination of the proceedings, is in a condition safely to exercise his discretion in fining the party, as he in fact now exercises it in deciding the matter of costs, without the delay and inconvenience of a separate trial upon the incidental question. But even if this were not so, I should be very unwilling to recommend the administration of an oath in Ceylon in any new case. The oaths administered to the votaries of the various religions prevailing in that Island, are for the most part accompanied by minute and superstitious ceremonies, the effect of which is to keep out of view the great moral duty of veracity. The anger of the gods is supposed to light, not upon the man who falsely swears away the life or property or reputation of his neighbour, but upon the man who swears falsely after he has stepped over part of his own dress, or tasted the water of the sacred river. In most cases, too, the oath is administered not by an officer of the Court, but by a priest. When the witness is a Buddhist, it is administered in the temple after the evidence has been given in Court, and it is not to be doubted that by a little management in the ceremony, false testimony may be procured without loading the conscience of the witness with the guilt of perjury.

Keeping constantly in view the principle, that just litigation is to be encouraged, and unjust litigation discouraged, I have recommended that the expenses of witnesses in all cases shall be paid out of the fund created by the fines.

It is certainly the duty and the interest of Government, (in the East, it is most emphatically so) to provide for the complete administration of justice at the public expense ; and I know of no reason why an honest suitor should be made to pay the expenses of those witnesses who are to prove his case, any more than to pay the salary of the judge who is to hear it, except it be true that the waste or misuse of the services of a judge by the suitors can be restrained, and that the waste or misuse of the services of witnesses cannot. It is unquestionably true, that under the actual circumstances of Ceylon, this waste and misuse of the services of witnesses is carried to an enormous extent. Your Lordship has already seen, upon the testimony of Mr. Justice Marshall, that in the criminal proceedings before the Supreme Court, the prisoners whose witnesses are paid by the public, frequently summon upwards of 100, who know nothing whatever of the matter in question ; but this glaring abuse, inasmuch as no attempt is made

to check it, furnishes no argument against the provision recommended in the 13th recommendation, when coupled with the securities recommended in the 7th recommendation.

When it is considered that, under the present system, the Provincial Judges are not intrusted even with the power of rejecting irrelevant evidence in appealable cases, it may be thought that too much power and discretion is given in my plan to the judges of original jurisdiction; but if I have increased the power and discretion of the local judges, I have increased their responsibility in a still greater degree by the regulations regarding assessors, which I have had the honour to submit to your Lordship, and by the regulations regarding appellate jurisdiction, which I am about to recommend. I have substituted the restraint imposed by the sense of responsibility, which adapts itself to the circumstances of each particular case, for the restraint imposed by inflexible rules, by which the progress of every case towards a just decision is obstructed, and that of many cases stopped entirely, in order that the remainder may be protected from judicial malversation.

It may also be supposed that when the whole suit is thus brought in its rude state before the judge, so much time will be consumed in performing those operations in Court which are now performed without any judicial superintendence, that a greater number of functionaries will become necessary to transact the increased business.

It must be remembered, however, that when the legal adviser of the party draws the pleadings and prepares the evidence to support them in secret consultation with his client, it is by no means his interest to present the case to the Court in such a form as will facilitate a speedy adjudication upon the merits, but rather to present it in such a shape as will increase to the greatest possible amount the burthen of proof resting upon the opposite party, and thereby to waste the time of the judge in superfluous investigations. I believe, therefore, though upon this point it is impossible to speak with perfect confidence, that the time which the Court will have to bestow upon a suit will, on an average, be less under the proposed plan than it now is.

But however that may be, the prevention of injustice, and of those crimes by which in Ceylon injustice is perpetrated through the forms of law, is an object of such extreme importance, that I shall earnestly recommend the plan under consideration to your Lordship, though some sacrifice of time and of public expense might be necessary for its accomplishment.

Even in this country the evils of which I am speaking are not unfelt. The Commissioners for inquiry into the Practice and Proceedings of the Superior Courts of Common Law have pointed out their existence, and have suggested remedies for them. But in Ceylon, where crimes of so deep a die as perjury and forgery are as common as the more venial arts of chicanery are in European countries, the interests of morality imperiously require the total reform of a system which affords scope and temptation to the commission of such enormities, and I sincerely believe that a Court of justice well constituted, and taking the legal affairs of the people completely under its supervision and protection, would be a more efficient instrument for the eradication of their prevailing vices than any other which a European Government can apply to that most essential purpose.

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It must not be forgotten, too, that a native of low caste has no chance of obtaining redress against his superiors but through the medium of Europeans. The English judge, under the present system, may indeed take care that justice is done to him when his case has been proved in Court; but who will advise him as to all the steps he must take before he reaches that point? Suppose a Rhodiah, a man accounted so vile that his countrymen will not endure that he should serve them as a slave: suppose such a degraded creature to have received something which even his broken spirit can feel as an injury: to say that the courts, as they are now constituted, are open to such a man, is no better than a most cruel mockery.

I do not indeed hope that any institution which human ingenuity can devise will remedy the inequalities which the pernicious system of caste has added to those existing by nature between man and man; but I cannot doubt that the spectacle of a European judge listening in public with attention and kindness to the complaints of the degrading races, and instructing them in their legal rights, and the means of enforcing them, would gradually eradicate the absurd and hateful prejudices by which the common feelings of human nature are prevented from springing up in the breasts of our Indian fellow-subjects.

I trust I shall be pardoned for making in this place a remark which has often pressed itself upon me: that the peculiar circumstances of Ceylon, both physical and moral, seem to point it out to the British Government as the fittest spot in our Eastern dominions in which to plant the germ of European civilization, whence we may not unreasonably hope that it will hereafter spread over the whole of those vast territories.

Recommendation 14.

14. I recommend that an appellate jurisdiction of the most comprehensive kind over all the Courts of original jurisdiction in all parts of the Island shall be vested in a Circuit Court of Appeal, which shall consist of one judge of the Supreme Court and three assessors, which assessors shall be chosen in the same way and shall perform the same functions as the assessors in the Courts of original jurisdiction.

Recommendation 15.

15. I recommend that the Supreme Court shall consist of three judges, a Chief Justice and two Puisne judges, who shall however never sit together except for the decision of such points of law as any of them may have thought it necessary to reserve in deciding the cases submitted to them on their circuits, under the 18th and 19th recommendations.

Recommendation 16.

16. I recommend that, for the purposes of the appellate jurisdiction mentioned in the 14th recommendation, the whole Island shall be divided into three circuits, which shall be called the Northern, Eastern and Southern Circuits, Colombo being the central point where the three circuits meet

Recommendation 17.

17. I recommend that a judge of the Supreme Court shall go on each circuit, twice every year, but so as that there shall be always one judge of that Court remaining at Colombo, and shall remain at

such places in his circuit and for so long a period at each place as may be necessary for the purposes of justice.

18. I recommend that such judge shall hear in the Circuit Court of Appeal all applications for redress against all decisions, whether interlocutory or final, of the Courts of original jurisdiction, and shall, according to what the justice of the case may require, try the cause over again wholly or in part, or rehear the arguments of the parties upon points of law, and shall do generally whatever may be necessary for the attainment of substantial justice.

Recommendation 18.

In the plan which is sketched in the above recommendations, I have endeavoured to unite the advantages, and to obviate the disadvantages, of the two different modes which have been devised for bringing justice within the reach of the suitors; I mean the mode by itinerant and the mode by local judicatures.

Reasons for recommendation 14, 15, 16, 17, 18,

The expedienc of local judicatures, always ready to receive the complaints of the people, cannot be disputed, provided first, that the opinion of a public whom the judge respects, can be brought to bear upon him; for unless this can be done, his Court is an open Court only in name, and all the evils of secret judicature may be expected. Secondly, that there be some means of preserving the unity of the law, which cannot fail to be impaired by the decisions of a number of independent judges, even though they should be animated solely by that public spirit which is kept alive by the substantial publicity of the tribunals.

The latter purpose might perhaps be attained at the cheapest rate by means of an appellate tribunal resident in Colombo, to which the records of cases tried by the Courts of original jurisdiction might be transmitted by the post, but such a tribunal could not be effectual, even for this purpose, unless a much greater degree of method regulated the proceedings of the local Courts than is now the case; and it would be almost for the still more important purpose of impressing upon the local judge the consciousness of unremitting supervision, and upon the suitors in this Court the assurance that their just complaints will be attended to and redressed.

This will, I hope, be accomplished as completely as the state of society in Ceylon will permit, by the recommendations respecting assessors, and by sending the appellate judge periodically to the places where the causes were originally tried, and thus giving the parties and their witnesses the same cheap and easy access to him as they had to the judge of original jurisdiction.

19. I recommend that the judges of the Supreme Court on their circuits shall continue to try in the maritime provinces such crimes as they now try, and with a jury constituted as the juries now are, and shall try the same crimes in the Kandyan provinces with a jury constituted in the same manner.

Recommendation 19

I shall not trouble your Lordship with any other reasons for this recommendation than the good effects already produced in the maritime provinces by the institution of juries, the attachment of the natives to it, and the propriety of distinguish-

Reasons for Recommendation 19.

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ing the trial of the graver crimes by some more solemn and impressive proceeding than is used in other cases.

Recommendation 20.

20. I recommend that the powers and duties of the Advocate Fiscal and deputy Advocate Fiscal shall be exercised in the Kandyan provinces, so far as regards procedure, as they now are in the maritime provinces.

Recommendation 21.

21. I recommend that the judges of the Supreme Court shall have no original jurisdiction, except that specified in the 19th recommendation.

Reasons for Recommendation 21.

When an itinerant Court exercises an original jurisdiction, all the proceedings preliminary to the trial must either be carried on, as in England, at the capital where such Court has its permanent station, or there must be resident in each district an officer exercising many most important functions both ministerial and judicial.

The former plan is, I believe, universally admitted to be impracticable in Ceylon.

The latter is sanctioned by the very high authority of the Chief Justice, as will be seen in his draft of a Charter, where he recommends that the magistrates who are, as he proposes, to have criminal jurisdiction over "all inferior offences, breaches of the peace and disorders against the police," and civil jurisdiction over causes, in which the amount in dispute does not exceed 25*l*., shall superintend the proceedings preliminary to the trial of those causes in which a greater amount is in dispute, and which are to be tried by the Supreme Court on circuit.

My objection (*l*) to this arrangement is, that the common division of causes into those of large and those of small amount, on which it is founded, is both unreasonable and invidious.

A magistrate who is competent to try the one sort is competent to try the other, the division is therefore unreasonable; and as causes of large amount are generally the causes of the rich, and causes of small amount are generally the causes of the poor, it is invidious to refer the latter to a tribunal which is stigmatized as unfit to try the former.

The Chief Justice's plan might indeed be extended to all cases without reference to the value in dispute; but if there are to be local functionaries of talents and respectability, which render them competent to adjudicate all the questions which arise in the process of preparing a cause for trial or hearing, I think it is clearly expedient that they should also have the power of deciding the cause in the first instance, and that the functions of the Metropolitan judge should be confined to those of an appellate judicature, it being always understood that I speak of an appellate judicature, from appealing to

(*l*) This objection does not apply to the decision of criminal causes, to the gravity or levity of the accusation; the correct decision of the former being really more important to the public welfare than that of the latter. On this account, and in consideration of the predilection which I believe to be entertained by the natives for the criminal jurisdiction of the Supreme Court as it now exists, I have preserved it by Recommendation 19.

which there is nothing to defer the suitor but the fear of being fined if his appeal turns out to be vexatious.

I think this is clearly expedient, because it saves time whenever the parties are satisfied that the cause has been fairly tried by the local judge, and because in all cases it obviates the irreparable evil which may be occasioned by the death of witnesses, of the loss or destruction of written proofs between the period at which the causes were ripe for trial, and the arrival of the metropolitan judge in the district where it arose.

My reason for recommending that the original civil jurisdiction now exercised by the Supreme Court in the district of Colombo shall be abolished, is that I apprehend that the appellate jurisdiction of the whole Island, and the general superintendence which, by recommendations 22 and 23, I propose that this Court should exercise, in addition to that exercised by way of appeal upon the motion of a party, will be amply sufficient to occupy the time of all its judges.

Recommendation 22.

22. I recommend that the judges of the Supreme Court, whether at Colombo or on circuit, shall receive applications in writing from the judges of original jurisdiction for advice upon all matters of law and practice, and shall return answers in writing thereto.

Recommendation 23.

23. I recommend that each judge of the Supreme Court, whether at Colombo or on circuit, shall hear motions for mandates in the nature of writs of *habeas corpus*, mandamus and prohibition, and shall do thereupon what justice may require.

Recommendation 24.

24. I recommend that no judge or Court shall hear motions for injunctions to prevent a party from seeking or pursuing his remedy in any other Court.

Reasons for Recommendation 24.

The reason of this negative recommendation is, that, according to my plan, every matter which would be sufficient to authorize the judge to grant an injunction to prevent a party from suing, for example in a Court of original jurisdiction, will be sufficient, when brought before such Court of original jurisdiction, to authorize the Court to give a judgment having the same effect as an injunction not to sue. The principle on which the recommendation rests, is that every Court of original jurisdiction should have, by law, the power of doing justice in every case, and consequently that, so long as the proceedings of such a Court are free from error or malversation, there should be no power in any other Court to thwart or control them, either directly by interference with the Court, or indirectly by interference with the suitor.

Recommendation 25.

25. I recommend that the judges of the Supreme Court shall look over the records of the Courts of original jurisdiction, and in case they shall observe that the law has been laid down differently, or that the practice has varied in the different Courts of original jurisdiction, shall take a note thereof, and shall consult together thereupon, and shall draw up a draft of such a declaratory law as the case may seem to them to require, and submit the same to the Governor, who shall thereupon pass, with the usual legislative forms, such law as the

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case may seem to him, and to those who may partake with him in the Legislative function, to require, without prejudice however to the right of the Governor and such persons so partaking with him in the legislative function, to legislate upon these, as upon all other subjects, without such recommendation.

The expense of the judicial establishments, described in the first part of this report, is 36,245*l.* (*m*); and I cannot undertake to say that justice can be effectually administered to 800,000 people at a much cheaper rate; but I can pledge myself that the sum required for that purpose, if my views should meet your Lordship's approbation, will not exceed the amount of the present expenditure.

The mode of educating the gentlemen who are to fill the judicial situations is a subject which cannot be separated from that of educating the civil servants in general, and which therefore cannot conveniently have a place here.

I have written the greater part of a Report of the Laws of Ceylon, as distinguished from the rules of procedure; but that particular portion of them which regulates the labour extorted by force from the natives, appears to me of so much greater immediate importance than any other, that I have proposed to lay my opinions upon it before your Lordship as soon as possible.

I have touched upon the subject in this Report (it obtrudes itself at every step upon an inquirer into the condition of Ceylon), but its connection with judicial establishments and procedure is not of a nature to have justified me in entering into those details which, from their own importance, are deserving of your Lordship's most attentive consideration.

C. H. CAMERON.

London, 31st January 1832.

To the Right Hon. Viscount Goderich.
&c., &c., &c.

(*m*) Annual Expense of the present judicial establishment of Ceylon.

	£	s.	d.
Supreme Court …… …… ……	13,030	18	0
Provincial Courts …… …… ……	8,987	11	6
Magistrates' Courts …… …… ……	6,008	15	6
Judicial Commissioner, Kandy …… ……	2,413	14	0
Magistrate, Kandy …… …… ……	345	0	0
Judicial Agent, Kurunegalle …… ……	272	14	0
Half of the fixed establishment of Agents of Government..	2,919	10	0
Contingencies fixed …… …… ……	538	7	2
Contingencies unfixed …… …… ……	826	6	6
Circuits of the Supreme Court …… ……	872	4	8
Total per Annum……£	36,245	0	11